Supreme Court of the United States

OCTOBER TERM, 1965

No. 694

WARREN W. PERRY, PETITIONER

vs.

COMMERCE LOAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)
)
WARREN W. PERRY)
) IN BANKRUPTCY NO. 3308
WAGE EARNER.) CHAPTER XIII

* * * *

DOCKET ENTRIES

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UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

DEBTOR'S PETITION—Plan filed August 8, 1963

Original Petition in Proceedings Under Chapter XIII for a Wage Earner Plan. In the United States District Court for the Eastern District of Kentucky

In the Matter of WARREN W. PERRY, Debtor. No. 3308

To the Honorable MAC SWINFORD

Judge of the United States District Court

FOR THE EASTERN DISTRICT OF KENTUCKY AT COVINGTON

THE PETITION OF WARREN W. PERRY of 2612 White Court, in the County of Kenton, State of Kentucky, by occupation a Furnace Operator and employed by Moore Lead Company, 4312 Spring Grove Avenue, Cinti, Ohio.

RESPECTFULLY REPRESENTS:

1. Your petitioner has resided (or has had his domicile) at Covington, Kentucky within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

[fol. 3] 2. Your petitioner is an individual whose principal income is derived from wages, salaries or commissions.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent (or unable to pay his debts as they mature), and desires to effect a composition

(or an extenstion of time to pay his debts, or a composition and an extension of time to pay his debts) out of his future earnings.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains and accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

WHEREFORE YOUR PETITIONER PRAYS that proceedings may be had upon this petition in accordance with the provisions of Chapter XIII of the Act of Congress relating to bankruptcy.

[fol. 4]

ROBERT J. HARRIS
Attorney for Petitioner
Robert J. Harris
1809 First National Bank Bldg.
Cincinnati, Ohio
Co-Counsel

HOWELL W. VINCENT
130 Park Place
Covington, Kentucky

WARREN W. PERRY
Petitioner

UNITED STATES OF AMERICA,)
)
STATE OF OHIO)ss:
)
COUNTY OF HAMILTON)

I, WARREN W. PERRY, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

WARREN W. PERRY
Petitioner.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 5th day of August, 1963.

/s/ Robert J. Harris
ROBERT J. HARRIS, Notary Public
IN AND FOR STATE OF OHIO.
(Official Character)

[fol. 5]

DEBTOR'S PROPOSED PLAN

Pursuant to the provisions of Chapter XIII of the Act of Congress, relating to bankruptcy, and the specific sections set forth below, the undersigned debtor proposes the following payment plan.

(1) SECURED CREDITORS—100% payment upon acceptance of the Plan: Secured debts shall be dealt with severally upon any terms, but only upon written acceptance of this plan. 646 (2-3). A debt shall be classed as secured to the extent of the value of the property encumbered. 57h.

(2) EXECUTORY CONTRACTS—Upon confirmation, the appointed Trustee shall assume of reject this debtor's outstanding executory contract. 613. (1). 646 (6).

(3) UNSECURED CREDITORS—100% payment. All debts held by unsecured creditors of this debtor, including the unsecured portion of partially secured claims, when duly proven, and allowed, shall be paid in full under this plan. Section 646. (1).

(4) STAY OF SUITS—During the pendency of this plan, the Court shall, upon notice and for cause shown, enjoin or stay until final decree, the commencement or continuation of suits against this debtor. Section 614.

(5) NON-ACCEPTING CREDITORS—Those creditors who will not accept payment under this plan, shall not be paid under this plan.. Upon compliance by the debtor, with the provisions of this plan, the Court shall enter an Order discharging all such debts. Sec. 626 (4).

(6) SUBMISSION OF EARNINGS & PROPERTY—The future earnings and property of this debtor are submitted to the exclusive control of this Court for the purpose of enforcing this plan. Sec. 660.

(7) ALTERNATION OF PLAN—The Court, from time to time, during the period of extention, may increase or reduce the amount of any of the installment payments provided by the plan, or may extend or shorten the time [fol. 6] for any such payments where it shall be made to appear after hearing upon notice that the circumstances of the doctor so warrant or require. Section 646 (5). The debtor further represents that he is able to carry out this plan, submits the following:

EMPLOYER: MOORE LEAD CO., 4312 Spring Grove Avenue, Cinti, Ohio.

TOTAL INDEBTEDNESS: $1412 plus Trustee's Administration expense and attory fees.

FEES IN THIS PROCEEDING $250.00

PROPOSED BUDGET:

RENT	40.00
FOOD	80.00
TRANSPORTATION	15.00
INSURANCE	12.00
MEDICAL	18.00
CLOTHING	20.00
MISCELLANEOUS	20.00
TRUSTEE	60.00
	$265.00

TAKE HOME PAY: $265.00

DEPENDENTS: Five (5)

WARREN W. PERRY

[fol. 7]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

ORDER OF COURT DATED SEPTEMBER 18, 1963, FOLLOWING THE FIRST MEETING OF CREDITORS ALLOWING COMMERCE LOAN COMPANY TEN DAYS TO FILE OBJECTIONS TO CONFIRMATION OF PLAN

This case came on for hearing at Covington, Kentucky, on September 12, 1963, pursuant to order of the Court after notice to creditors as required by law for the First Meeting of Creditors. Present were: The Debtor and his attorney, Robert J. Harris, who has designated Howell W. Vincent, 130 Park Pace, Covington, Kentucky, as resident attory for receipt of notices, and R. Howard Smith, attorney for Commerce Loan Company.

It appearing from examination of the Debtor that he filed a prior bankruptcy proceeding in this Court on May 20, 1959, Case No. 1679 in which he received a discharge in bankruptcy on June 29, 1959, and Commerce Loan

Company having objected to confirmation of the Plan by and through its attorney, R. Howard Smith, and it appearing to the Court that the Plan is feasible, and that the Debtor has paid the filing fee and the confirmation fee in this proceeding, and has filed an application for confirmation of the Plan, it is

ORDERED that said Commerce Loan Company is allowed ten days from the date of the entry of this order to file in writing with the Court its objection to confirmation of the Plan setting out the basis therefor at which time the matter will stand submitted to the Court without further hearing otherwise ordered by the Court.

[fol. 8]

IT IS FURTHER ORDERED that during the pendency of this matter the Debtor continue to pay to his attorney of record the payments provided for in the Debtor's Plan, and that said monies be held by the attorney of record as an officer of the Court subject to order of the Court.

IT IS ORDERED that copies of this order be served by mail upon the parties named below.

At Lexington, Kentucky, this September 18, 1963.

/s/ Joe Lee
Referee in Bankruptcy

COPIES OF THIS ORDER
SERVED BY MAIL UPON:

ROBERT J. HARRIS
Attorney for Debtor

WARREN W. PERRY
Debtor

R. HOWARD SMITH
Attorney for Commerce Loan Co.

A COPY ATTEST:

JOE LEE, Referee in Bankruptcy
By L. F. Logan, Clerk

[fol. 9]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:	)	
	)	
WARREN W. PERRY,	)	
	)	IN BANKRUPTCY NO. 3308
WAGE EARNER.	)	CHAPTER XIII

MOTION OF COMMERCE LOAN COMPANY TO DISMISS THE PETITION—Filed September 12, 1963.

Comes Commerce Loan Company of Covington, a corporation, and respectfully moves the Court for an Order dismissing the Petition of Debtor, Warren W. Perry, and to strike the same, along with his Plan Schedules, from the Docket in this cause, on the grounds that said Debtor, as a Bankrupt, in Action No. 1679, United States District Court, Eastern District of Kentucky, Covington, Kentucky, Division, obtained a Discharge in said proceeding last mentioned herein on date of June 29, 1959, and within six years next preceding the filing of this cause.

AUTHORITY: In Re: Schlageter, decided by the Third Circuit Court of Appeals, and for citation see Commerce Clearing House Bankruptcy, Par. 60.882.

R. HOWARD SMITH,
Attorney for Commerce Loan Company of Coxington, Lawyers Bldg, Newport, Kentucky.

I hereby certify that I have served a true and exact copy of the within Motion upon Debtor named herein, by mailing same to Hon. Robert J. Harris, his attorney, at the address of First National Bank Building, Cinti, Ohio, on this the 12th day of September, 1963.

/s/ R. Howard Smith
Attorney for Commerce Loan Company of Covington.

[fol. 10]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:	)	
	)	
WARREN W. PERRY,	)	
	)	IN BANKRUPTCY NO. 3308
WAGE EARNER.	)	CHAPTER XIII

REFEREE'S OPINION AND ORDER ENTERED DECEMBER 2, 1963, DISMISSING THE DEBTOR'S PETITION

This matter is pending upon the application of the debtor for confirmation of his wage earner plan under Chapter XIII of the Bankruptcy Act, and upon the countermotion of Commerce Loan Company of Covington, a creditor, to dismiss the debtor's petition. Dismissal is sought on the ground the debtor obtained a discharge in bankruptcy in a proceeding in this court commenced within six years prior to the date of the filing of the petition under Chapter XIII. The records of this court reveal the debtor filed a petition in straight bankruptcy on May 20, 1959, case no. 1679, and obtained a discharge in bankruptcy therein on June 29, 1959. The present proceeding was filed August 8, 1963.

The question presented is whether relief under Chapter XIII for a wage earner plan is barred by the fact the debtor has been granted a discharge in bankruptcy in a proceeding filed within six years next preceding the filing of the petition under Chapter XIII.

The issue is complicated by the fact the United States Courts of Appeal for the Tenth and Third Circuits have reached opposite conclusions on the matter. See Edins v. Helzberg's Diamond Shops, Inc., C.A. 10, 315 F. 2d 223, decided April 5, 1963, holding a debtor is entitled to relief by means of a wage earner plan under Chapter XIII under such circumstances, and In re Schlageter, C.A. 3, 319 F. 2d 821, decided July 5, 1963, holding he is not.

[fol. 11] The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . . ." (11 U.S.C.A. Sec. 1002)
>
> "Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges, and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)
>
> "Sec. 656(a). The court shall confirm the plan if satisfied that ————
>
> * * * *
>
> (3) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." (11 U.S.C.A. Sec. 1056) (Underscoring added).

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has commited any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

> "Sec. 14c. The Court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . . ." (11 U.S.C.A. Sec. 32, sub. c.)

A provision similar to Section 656(a)(3), supra, appears in Chapter XI, Sec. 366(3) of the Act. The United States Court of Appeals for the Sixth Circuit had occasion to construe this latter provision in the case of In re Goldberg, 53 F. 2d 454, 80 A.L.R. 399. A careful reading of that opinion convinces the court that, while there was

[fol. 12] disagreement on other grounds, both the majority and minority opinions are in accord on the proposition that all the prohibitive clauses of Sec. 14c are incorporated by reference in Sec. 366(3). In the majority opinion the court said at page 455:

> ". . . The applicable portion thereof is section 12d (11 U.S.C.A. Sec. 30(d), to-wit, that 'the judge shall confirma composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith.' This paragraph originated with the Act, and Congress has never disturbed it. It is not difficult to determine what "acts" and 'duties' were referred to in clause (2). They are those acts and duties found in clauses (1) and (2) of section 14(b) of the original Act. Section 14b has been amended from time to time until it now stands as printed in the margin. By its provisions, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its numbered clauses. See Bluthenthal v. Jones, 208 U.S. 64, 65, 28 S. Ct. 192, 52 L. ed. 390; In re Jacobs, 241 F. 620, 624 (C.C.A. 6). *Section 12d(2) denies composition upon the same grounds; that is, if the bankrupt has been guilty of any of the acts or failed to perform any of the duties specified in section 14b,* AS IT NOW STANDS, which would be a bar to his discharge. If appellant is denied confirmation of the composition he has made with his creditors, it can only be because he is guilty of the offense of applying for such an order within six years after he has been granted a discharge in bankruptcy." See clause (5) of Section 14b . . . ." (Under scoring supplied).

While there is other language in the majority opinion which might be interpreted as modifying the postulate that Sec. 12d(2), now Sec. 366(3) incorporates by reference all of Sec. 14b, now Sec. 14c, as implied in the

above-quoted language, it would appear the court was simply emphasizing that the appellant coud not be deemed guilty of committing the offense of having been granted a discharge in bankruptcy since it was not clear Congress intended the confirmation of a composition to be the [fol. 13] equivalent of a discharge in bankruptcy. By subsequent amendment of the Act of Congress has made it clear that confirmation of a composition and a discharge in bankruptcy are equivalent. Act of 1938; Collier on Bankruptcy, 14th Ed., Vol 1, Sec. 14.01, page 1252. But the hypothesis that Sec. 366 (3) incorporates by reference all of Sec. 14c remains sound.

The various debtor relief chapters are in pari materia. Hellenbeck v. Penn Mutual Life Insurance Co., Bankruptcy Law Reporter No. 221, Oct. 29, 1963, CCH 60,957. If Sec. 366(3) of Chapter XI incorporates by reference all of Sec. 14c of Chapter iii, it follows that Sec. 356(a) of Chapter XIII' does likewise, with the result that confirmation of a wage earner plan is precluded if the debtor has been granted a discharge in bankruptcy in a proceeding commenced within six years prior to the date of the filing of the petition under Chapter XIII.

As stated by the court In re Greenman, 10 F. Supp. 452, at page 453: "It seems to me more reasonable to believe that when Congress provided that the debtor's composition should be confirmed unless he had 'been guilty of any of the acts or failed to perform any of the duties which would be a ground for denying his discharge,' it was nothing but a rather shipshod way of saying that the debtor should have his composition confirmed (and thus be discharged) unless he had by his own act placed himself in a position where he could not receive a discharge under Section 14 in an ordinary bankruptcy." Since the language of Sec. 366 (3) and 356a(3) are similar it would seem Congress intended that a wage earner plan either by way of composition or extension should not be confirmed unless the debtor is entitled to a discharge in bankruptcy.

There is authority for the view that Section 14c(5) is [fol. 14] inconsistent or in conflict with the provisions of Chapter XIII and therefore inapplicable to wage earner proceedings. If this view is valid a prior discharge would

not even bar a subsequent wage earner plan by way of composition. See In re Konbluth, C.A. 2, 65 F. 2d 400, at page 403.

In re Mahaley, 187 F. Supp. 229, (1960) and In re Sharp 205 F. Supp. 786 (1962), it was concluded that the *purposes* underlying Sec. 14, sub. c(5) of the Bankruptcy Act are so inconsistent with the *purposes* underlying relief by way of extension under Chapter XIII as to make said section inapplicable in Chapter XIII proceedings. The word *purposes* is underlined to emphasize there was no finding of inconsistency or conflict in specific language. It is worth noting that Sec. 602 of the Act provides that Chapters 1 to 7 shall apply insofar as they are not inconsistent or in conflict with the *provisions* of Chapter XIII. This would seem to require a finding of inconsistency or conflict in rather specific provisions rather than in purposes.

The conclusion herein is buttressed by the provision in Section 606 of the Act not referred to in the *Mahaley* or *Sharp* cases, to the effect that the rights, privileges and duties of the debtor are the same as those of a bankrupt. It would seem therefore that a right to a discharge is a prerequisite to the right to have a wage earner plan confirmed.

Accordingly, the debtor's application for confirmation of his plan should be, and hereby is, denied, and the motion of Commerce Loan Company to dismiss the petition should be, and hereby is, sustained.

[fol. 15] IT IS ORDERED that copies of this Opinion and Order be served by mail upon the parties shown below.

At Lexington, Kentucky, this December 2, 1963.

/s/ Joe Lee
Referee in Bankruptcy

COPIES OF THIS ORDER
SERVED BY MAIL UPON:

ROBERT J. HARRIS,
Attorney for Debtor.

R. HOWARD SMITH
Attorney for Commerce Loan
Company of Covington, Kentucky

[fol. 16]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

PETITION FOR REVIEW—Filed January 2, 1964

TO JOE LEE, ESQ., REFEREE IN BANKRUPTCY

1. Your petitioner is aggrieved by the order herein of Joe Lee, Referee in Bankruptcy, dated December 2, 1963, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.

2. The Referee erred in respect to said order, in that the Referee denied debtor's application for confirmation of Wage Earner Plan and sustained the Motion of Commerce Loan Company to dismiss the Petition of Warren W. Perry because relief under Chapter 13, for a Wage Earner Plan is barred by the fact that the debtor had been granted a Discharge in Bankruptcy within six (6) years next preceeding filing of his Petition under Chapter 13, and such ruling was clearly erroneous.

3. WHEREFORE, your Petitioner prays that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy, that said order be reversed, that the Wage Earner Plan filed by the Petitioner be confirmed pursuant to Chapter 13 of the Bankruptcy Act, and that your petitioner have such other and further relief as is just.

/s/ Warren W. Perry
Petitioner

DATED DEC. 31, 1963.

/s/ Robert J. Harris
ROBERT J. HARRIS, Atty for Petitioner
1809 First Nat'l Bank Bldg,
Cinti, Ohio

[fol. 17] CERTIFICATE

I, hereby certify that on the 31st day of December, 1963, I mailed a copy of the above Petition for Review to R. HOWARD SMITH, Attorney for Commerce Loan Company.

/s/ Robert J. Harris
ROBERT J. HARRIS
Attorney for Debtor

[fol. 18]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

ORDER OF THE U.S. DISTRICT COURT DATED JANUARY 20, 1964 AFFIRMING OPINION AND DECISION OF THE REFEREE IN BANKRUPTCY.—January 21, 1964

The petition for review filed by the debtor is dismissed and the opinion and order of the referee denying confirmation of the debtor's wage earner's plan is affirmed.
See Memorandum

MAC SWINFORD, Judge

[fol. 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

* * * *

MEMORANDUM OPINION—January 21, 1964

The wage earner has filed a Petition for Review of an Order of the Referee denying his application for confirmation of his wage earner plan and dismissing his petition. The Referee wrote an Opinion in connection with the Order complained of justifying his action in denying confirmation on the ground that the Debtor obtained a Dis charge in Bankruptcy in this Court on June 29, 1959. The present proceeding was commenced on August 8, 1963.

The question of whether the six-year limitation on successive proceedings under the Bankruptcy Act is applicable to wage earners' plans is by no means settled by the judicial authorities, nor is it expressly resolved by the language of the Act. This judge is of the view, however, that the Opinion of the Referee is correct and that it should be affirmed.

Section 656 of the Act (11 U.S.C. 1056) provides that the court shall confirm a wage earner's plan if, among other conditions, the debtor has not been guilty of any act which would be a bar to the discharge of a bankrupt. A discharge within six years prior is, of course, a bar to a discharge in bankruptcy. 11 U.S.C. 32(5). A number of cases, represented by *In re Holmes*, 10th Cir., 309 F. 2d 748 (1962), have been decided on the view that a wage earner's plan in the nature of an extension should not be barred by a prior discharge because it is so different in purpose from the relief afforded by straight bankruptcy. This reasoning is open to the criticism, however, that there should be no accounting for the purpose of legislation except to resolve ambiguity in the language used therein.

The use of the word "guilty" in section 656(a) (4) in referring to the conduct which bars confirmation of a wage earner's plan may perhaps lead to the thought that [fol. 20] only conduct which is inherently reprehensible is

comprehended by the provision. The appearance of this word here is accidental. The language of the section is a carryover from the corresponding provision in Chapter 11 relating to compositions. This chapter was enacted in 1874, a time when the bars to discharge embraced only offenses under the Bankruptcy Act punishable by imprisonment and the destruction or concealment of records. This would provide a suitable context for the word "guilty" and when prior discharge was added to these bars, the phraseology was not changed, possibly through negligent draftmanship. See *In re Goidberg*, 6th Cir., 53 F. 2d 454 (1931).

The opinion in *In re Holmes, supra*, does not specify the reason for resorting of the general purpose of the legislation as an aid to construction. This decision along with those in *In re Sharp*, W.D. Mo., 205 F. Supp. 786 (1962) and *In re Mahaley*, S.D. Calif., 187 F. Supp. 229 (1960), does well to some extent on section 602 of the Act (11 U.S.C. 1002) which incorporates by reference into Chapter 13 as much of Chapters 1 to 7 as is not inconsistent with the provisions of Chapter 13. But this is only one possible means of carrying the six-year limitation into the matter of confirming wage earners' plans and a general finding of inconsistency of purpose would seem to have no application beyond consideration of how this particular section should operate. The more immediate concern is with the effect of Section 656(a) (4) which states that no more nor less than that whatever is a bar to a discharge in bankruptcy is a bar to the confirmation of a wage earner's plan.

This judge is supported by the case of *In re Schlageter*, 3rd Cir., 319 F. 2d 831 (1963) which holds that a discharge in bankruptcy not more than six years earlier is a bar to the confirmation of a wage earner's plan. The opinion is largely directed to the debtor's argument that [fol. 21] since his plan only contemplated an extension, and all debts would eventually be paid in full, the six-year limitation would be inappropriate. The Court reasoned that no wage earner's plan can be characterized as a simple extension because by operation of Section 661 (11 U.S.C. 1061), the debtor may be discharged at the end

of three years if his failure to pay all his debts is due to circumstances beyond his control.

This Court is also bound by the reasoning of the Court of Appeals for the Sixth Circuit in *In re Goldberg, supra.* The question there was whether a composition under Chapter 11 of the Act could be confirmed when the debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a discharge in bankruptcy. The Court never questions whether the six-year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior discharge in bankruptcy.

An Order is entered this day affirming the Opinion of the Referee and dismissing the Petition for Review.

/s/ Mac Swinford
Judge

January 20, 1964.

R. HOWARD SMITH
Lawyers Building
Newport, Kentucky
Attorney for Appellee.

ROBERT J. HARRIS
1809 First National Bank Bldg.
Cincinnati, Ohio
Attorney for Appellant

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Before: WEICK, Chief Judge, CECIL, Circuit Judge and KENT, District Judge.

ARGUMENT AND SUBMISSION—Dec. 8, 1964

This cause is argued by Robert J. Harris for Appellant and by R. Howard Smith for appellee, and is submitted to the Court.

[fol. 23]

No. 15809

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * *

In the Matter of

WARREN W. PERRY, DEBTOR

WARREN W. PERRY, APPELLANT

v.

COMMERCE LOAN COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern District of Kentucky.

OPINION—January 25, 1965.

Before WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.*

* Sitting by designation from the U. S. District Court, Western District of Michigan.

PER CURIAM. Perry, the debtor, filed in the District Court a Wage Earner Plan under Chapter XIII of the Bankruptcy Act, 11 U.S.C. §§ 1001-1086. His petition revealed, however, that he had previously filed a petition in bankruptcy within six years of filing the Wage Earner Plan and had been granted a discharge. The referee, for that reason, denied his application for confirmation of the plan and upon motion of a creditor dismissed the petition. This ruling was affirmed by the District Judge upon review of the referee's order.

The only question before us is whether the previous bankruptcy within six years barred confirmation of the plan and warranted dismissal of the case.

In order to confirm the plan, the court must be satisfied among other things, that "the debtor has not been guilty [fol. 24] of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt." 11 U.S.C. § 1056 (3).

A discharge within six years operates as a bar to the discharge of a bankrupt. 11 U.S.C. § 32(c) (5).

The plain language of the Act prevented the court from confirming the plan in the present case. The fact that a Wage Earner Plan seeking an extension of time to pay the indebtedness was involved, instead of another ordinary bankruptcy case, was immaterial. The statutory bar existed in either case.

If proceedings of this type are to be exempted from the provisions of Section 32(c) (5), such exemption should be made by Congress and not by the courts. The National Bankruptcy Conference has proposed amendments to the Act which would permit the filing of such proceedings within six years. See Proceedings of Nat'l Bankruptcy Conf. 1961 Ann. Meeting, Res. No. 2, and Proceedings of Nat'l Bankruptcy Conf. Ann. Meeting of October 25-26, 1962.

Our views are supported by *In the Matter of Schlageter*, 319 F.2d 821 (C.A. 3, 1963); *In re Jensen*, 200 F.2d 58 (C.A. 7, 1952); *In the Matter of Fontan*, 227 F.Supp. 973 (S.D. Miss. 1964); *In the Matter of Nicholson*, 224 F. Supp. 773 (D. Ore. 1963); *In the Matter of Bingham*, 190 F.Supp. 219 (D. Kan. 1960), *aff'd* 297 F.2d 341.

There are other decisions, which we do not follow, that have reached a contrary result. *Edins* v. *Helzberg's Diamond Shops, Inc.*, 315 F.2d 223 (C.A. 10, 1963); *In re Sharp*, 205 F. Supp. 786 (W.D. Mo. 1962); *In the Matter of Mahaley*, 187 F.Supp. 229 (S.D. Cal. 1960); *In the Matter of Verlin*, 148 F.Supp. 660 (E.D. N.Y. 1957), *aff'd* 255 F.2d 682 (C.A. 2, 1958). In our opinion the statute is not susceptible to the construction given it in these cases.

Affirmed.

[fol. 25]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,809

* * * *

In the Matter of

WARREN W. PERRY, DEBTOR

WARREN W. PERRY, APPELLANT

vs.

COMMERCE LOAN COMPANY, APPELLEE

BEFORE: WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.

APPEAL from the United States District Court for the Eastern District of Kentucky.

JUDGMENT—January 25, 1965

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that appellee recover from appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

COSTS: NONE

Filing fee	$———
Printing appendix	$———
Bond premiums	$———
Total	$———

[fol. 26]

[Clerk's Certificate (omitted in Printing)]

[fol. 27]

SUPREME COURT OF THE UNITED STATES

No. 120 Misc., October Term, 1965

WARREN W. PERRY, PETITIONER

v.

COMMERCE LOAN COMPANY

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI —October 25, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 694 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 792889 323

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In the

Supreme Court of the United States

October 1965 Term

No. 120 Misc.

In the Matter of: Warren W. Perry, Debtor.

WARREN W. PERRY,

Petitioner,

vs.

COMMERCE LOAN COMPANY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Commerce Loan Company, prays that the Petition for Writ of Certiorari, filed by the Petitioner, Warren W. Perry, to review the Order and Judgment of the United States Court of Appeals for the Sixth Circuit, in the above entitled cause, affirming the Judgment of the United States District Court, for the Eastern District of Kentucky, sitting at Covington, be denied.

OPINIONS BELOW

1. The Opinion and Judgment of the Sixth Circuit Court of Appeals, reported in the matter of Warren W. Perry, Debtor, *Warren W. Perry, Appellant* v. *Commerce Loan Company, Appellee,* No. 15809, United States Court of Appeals, Sixth Circuit, January 25, 1965, reported in 340 F.(2d) 588 (1965), appended hereto as Appendix C.

2. Opinion of the District Court of the United States, for the Eastern District of Kentucky, Covington, in Action No. 63-3308, in the matter of Warren W. Perry, Debtor, in Proceedings for a Wage Earner Plan, appended hereto as Appendix B.

3. Original Opinion and Order of Hon. Joe Lee, Referee, appended hereto as Appendix A.

QUESTIONS PRESENTED

The question presented is whether a Discharge in Bankruptcy received within six years prior to a proceeding for relief under Chapter XIII of Bankruptcy Act constitutes a bar to confirmation of a Wage Earner Plan.

All three Courts from which this Petition is here presented on Appeal for Writ of Certiorari, have held that the Debtor was guilty of certain acts or failed to perform certain duties which would be a bar to his Discharge in Bankruptcy. 11 U.S.C., Sec. 1056 (3). Said Courts further held that by the language of 11 U.S.C. Sec. 32 (C) (5), providing that a Discharge within six years operates as a bar to a Discharge of the Bankrupt, prevented the Courts from confirming the Plan in the instant case.

The initial proceeding was commenced on August 8, 1963. The issue is complicated by the fact that the United States Court of Appeals for the Tenth and Third Circuits

have reached opposite conclusions on the matter of Law presented. The Sixth Circuit has now held with the Third Circuit on this question.

PROPOSITIONS AND AUTHORITIES

The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of Chapters 1 to 7 inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter apply in Proceedings under this chapter . . ." (U.S.C.A. Sec. 1002)
>
> "Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges, and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)
>
> "Sec. 656(a). The court shall confirm the plan if satisfied that—
>
> * * *
>
> (3) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . ." (11 U.S.C.A. Sec. 1056)

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

> "Sec. 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years

prior to the date of the filing of the petition in bankruptcy been granted a discharge, or had a composition or a wage earner's plan by way of composition confirmed under this Act . . ." (11 U.S.C.A. Sec. 32, sub. c.)

We respectfully invite this Court's attention and consideration to the following cases, viz:

In re: Schlageter, 3rd Cir., 319 F.2d 821 (1963);
In re: Goldberg, 6th Cir., 53 F.2d 454 (1931), and
In re: Helen Christine Nicholson, Debtor, U. S. Dis. Court, D. Oregon, (Oct. 25, 1963) Fed. Supp. 224, p. 773.

The *Schlageter* case, cited above, holds that a Discharge in Bankruptcy, not more than six years earlier, is a bar to the confirmation of a Wage Earner's Plan. The opinion is largely directed to the Debtor's argument that since his plan only contemplated an extension, and all debts would eventually be paid in full, the six year limitation would be inappropriate. The Court reasoned that no Wage Earner's Plan can be characterized as a simple extension, because by operation of Sec. 661 (11 U.S.C.A. 1061), the Debtor may be discharged at the end of three years, if his failure to pay all his debts is due to circumstances beyond his control.

In the *Goldberg* case cited, *supra,* the question there was whether a composition of Chapter 11 of the Act could be confirmed when the Debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a Discharge in Bankruptcy. The court never questions whether the six year limitation is comprehended by this expression and the opinion is taken up

entirely with the matter of whether a prior composition has the same effect as a prior Discharge in Bankruptcy.

In the *Nicholson* case cited, *supra,* the two secured creditors and all of the unsecured creditors who had filed claims, accepted the plan, and consequently, no objection whatsoever was offered by any of the creditors, notwithstanding the fact that they had full knowledge of the prior bankruptcy, and a discharge in connection therewith within the six year period prior to the commencement of the debtor petition under Chapter XIII. The Referee, nevertheless, entered an Order denying confirmation and dismissed the proceeding on the ground that petitioner had been granted a Discharge in Bankruptcy within six years next preceding the filing of Chapter XIII Petition. An appeal was prosecuted to District Judge Kilkenny with the result that the Referee's decision was affirmed. Judge Kilkenny discusses at great length in his opinion the applicable principles of law, and we respectfully invite this Court's attention to same.

A most recent Decision handed down by the United States District Court may be found in Fed. Supp. 227, Page 973. *In the matter of John E. Fontan, Debtor,* Case No. 2303-B, Southern District of Mississippi. This Decision takes the same position on the proposition involved as Authorities heretofore cited by the Appellee herein.

ARGUMENT

Until the intervention of this Decision by the Referee and the succeeding Affirming Courts designated herein, it was frequent practice for Debtors in straight bankruptcy actions to seek discharge from their obligations and within a period of two to six months thereafter incur other indebtedness and then file a Petition under Chapter XIII, there-

by seeking to relieve and release themselves from their newly found liabilities. Such persons became known, in Lawyer's parlance as "repeaters," who apparently were not seeking the honest protection of the Law but to defraud their creditors, whenever and wherever the opportunity arose. We concur in the expressed Opinion of the learned Judge, Mac Swinford, in a bankruptcy case on record in the United States Court, Eastern District of Kentucky, at Covington, known and designated as the *Edward Louis Ott* matter, in which Judge Swinford said:

> "Bankruptcy is essentially an equitable proceeding, and there is no place in our system of jurisprudence where open and above board dealings are more essential. The Law is willing to relieve an oppressed debtor of his debts where he, himself, has come into Court with clean hands."

RELIEF

It is respectfully urged that the conclusion to be reached herein is supported by provisions of Section 606 of the Act, to the effect that the rights, privileges and duties of the Debtor, under Chapter XIII Proceedings, are the same as those of a Bankrupt. It would appear to follow that a right to a discharge is a prerequisite to the right to have a Wage Earner Plan confirmed. Accordingly, if the Debtor, under Chapter XIII was in no position to receive a Discharge by reason of having received the same within a period of six years previous to the Chapter XIII Proceedings, that his Application for Confirmation of Plan and his Petition in connection therewith should be, upon Motion duly made, as was done in this case, dismissed.

It is respectfully submitted and urged to this Court that the Rulings made by the numerous Courts herein cited

embody the correct theory of the Law; and, for the reasons as cited in this Response, we respectfully pray that the Conclusions and Decisions heretofore reached by said Courts be Affirmed; that the Petition for Writ of Certiorari be denied, and all proper relief to which the Appellee herein may be entitled in the premises.

Respectfully submitted,

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Attorney for Appellee.

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APPENDIX "A"

OPINION AND ORDER OF HON. JOE LEE, REFEREE

This matter is pending upon the application of the debtor for confirmation of his wage earner plan under Chapter XIII of the Bankruptcy Act, and upon the countermotion of Commerce Loan Company of Covington, a creditor, to dismiss the debtor's petition. Dismissal is sought on the ground the debtor obtained a discharge in bankruptcy in a proceeding in this court commenced within six years prior to the date of the filing of the petition under Chapter XIII. The records of this court reveal the debtor filed a petition in straight bankruptcy on May 20, 1959, case No. 1679, and obtained a discharge in bankruptcy therein on June 29, 1959. The present proceeding was filed August 8, 1963.

The question presented is whether relief under Chapter XIII for a wage earner plan is barred by the fact the debtor has been granted a discharge in bankruptcy in a proceeding filed within six years next preceding the filing of the petition under Chapter XIII.

The issue is complicated by the fact the United States Courts of Appeal for the Tenth and Third Circuits have reached opposite conclusions on the matter. See Edins vs. Helzberg's Diamond Shops, Inc., C.A. 10, 315 F. 2d 223, decided April 5, 1963, holding a debtor is entitled to relief by means of a wage earner plan under Chapter XIII under such circumstances, and In re Schlageter, C.A. 3, 319 F. 2d 821, decided July 5, 1963, holding he is not.

The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . ." (11 U.S.C.A. Sec. 1002)

"Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)

Sec. 656(a). The court shall confirm the plan if satisfied that—

* * *

(3) The debtor has not been *guilty* of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . ." (11 U.S.C.A. Sec. 1056) (Italics added).

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

"Sec. 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . ." (11 U.S.C.A. Sec. 32, sub. c.)

A provision similar to Section 656(a) (3), supra, appears in Chapter XI, Sec. 366(3) of the Act. The United States Court of Appeals for the Sixth Circuit had occasion to construe this latter provision in the case of In re Goldberg, 53 F. 2d 454, 80 A.L.R. 399. A careful reading of that opinion convinces the court that, while there was disagreement on other grounds, both the majority and minority

opinions are in accord on the proposition that all the prohibitive clauses of Sec. 14c are incorporated by reference in Sec. 366(3). In the majority opinion the court said at page 455:

> ". . . The applicable portion thereof is section 12d (11 U.S.C.A. Sec. 30(d), to-wit: that 'the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith.' This paragraph originated with the Act, and Congress has never disturbed it. It is not difficult to determine what 'acts' and 'duties' were referred to in clause (2). They are those acts and duties found in clauses (1) and (2) of section 14b of the original Act. Section 14b has been amended from time to time until it now stands as printed in the margin. By its provisions, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its numbered clauses. See Bluthenthal v. Jones, 208 U.S. 64, 65, 28 S. Ct. 192, 52 L. ed 390; In re Jacobs, 241 F. 260, 624 (C.C.A. 6). *Section 12d(2) denies the composition upon the same grounds; that is, if the bankrupt has been guilty of any of the acts or failed to perform any of the duties specified in section 14b, as it now stands,* which would be a bar to his discharge. If appellant is denied confirmation of the composition he has made with his creditors, it can only be because he is guilty of the offense of applying for such an order within six years after he 'has been granted a discharge in bankruptcy.' See clause (5) of Section 14b . . ." (Italics supplied).

While there is other language in the majority opinion which might be interpreted as modifying the postulate that Sec. 12d(2), now Sec. 366(3) incorporates by reference all

of Sec. 14b, now Sec. 14c, as implied in the above-quoted language, it would appear the court was simply emphasizing that the appellant could not be deemed guilty of committing the offense of having been granted a discharge in bankruptcy since it was not clear Congress intended the confirmation of a composition to be the equivalent of a discharge in bankruptcy. By subsequent amendment of the Act Congress has made it clear that confirmation of a composition and a discharge in bankruptcy are equivalent. Act of 1938; Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 14.01, page 1252. But the hypothesis that Sec. 366(3) incorporates by reference all of Sec. 14c remains sound.

The various debtor relief chapters are in pari materia. Hellenbeck vs. Penn Mutual Life Insurance Co., Bankruptcy Law Reporter No. 221, Oct. 29, 1963, CCH 60,957. If Sec. 366(3) of Chapter XI incorporates by reference all of Sec. 14c of Chapter III, it follows that Sec. 356(a) of Chapter XIII does likewise, with the result that confirmation of a wage earner plan is precluded if the debtor has been granted a discharge in bankruptcy in a proceeding commencing within six years prior to the date of filing of the petition under Chapter XIII.

As stated by the court in Re Greenman, 10 F. Supp. 452, at page 453: "It seems to me more reasonable to believe that when Congress provided that the debtor's composition should be confirmed unless he had 'been guilty of any of the acts or failed to perform any of the duties which would be a ground for denying his discharge,' it was nothing but a rather slipshod way of saying that the debtor should have his composition confirmed (and thus be discharged) unless he had by his own act placed himself in a position where he could not receive a discharge under Section 14 in any ordinary bankruptcy." Since the language of Sec.

366(3) and 356(3) are similar it would seem Congress intended that a wage earner plan either by way of composition or extension should not be confirmed unless the debtor is entitled to a discharge in bankruptcy.

There is authority for the view that Section 14c(5) is inconsistent or in conflict with the provisions of Chapter XIII and therefore inapplicable to wage earner proceedings. If this view is valid a prior discharge would not even bar a subsequent wage earner plan by way of composition. See In re Kornbluth, C.A. 2, 65 F. 2d 400, at page 403.

In In re Mahaley, 187 F. Supp. 229, (1960) and In re Sharp, 205 F. Supp. 786 (1962), it was concluded that the *purposes* underlying Sec. 14, sub. c(5) of the Bankruptcy Act are so inconsistent with the *purposes* underlying relief by way of extension under Chapter XIII as to make said section inapplicable in Chapter XIII proceedings. The word *purposes* is underlined to emphasize there was no finding of inconsistency or conflict in specific language. It is worth noting that Sec. 602 of the Act provides that Chapters 1 to 7 shall apply insofar as they are not inconsistent or in conflict with the *provisions* of Chapter XIII. This would seem to require a finding of inconsistency or conflict in rather specific provisions rather than in purposes.

The conclusion herein is buttressed by the provision in Section 606 of the Act, not referred to in the *Mahaley* or *Sharp* cases, to the effect that the rights, privileges and duties of the debtor are the same as those of a bankrupt. It would seem therefore that a right to a discharge is a prerequisite to the right to have a wage earner plan confirmed.

Accordingly, the debtor's application for confirmation of his plan should be, and hereby is, denied, and the motion of Commerce Loan Company to dismiss the petition should be, and hereby is, sustained.

IT IS ORDERED that copies of this Opinion and Order be served by mail upon the parties shown below.

At Lexington, Kentucky, this December 2, 1963.

/s/ JOE LEE
Referee in Bankruptcy

APPENDIX "B"

MEMORANDUM (OPINION) OF HON. MAC SWINFORD, JUDGE

The wage earner has filed a Petition for Review of an Order of the Referee denying his application for confirmation of his wage earner plan and dismissing his petition. The Referee wrote an Opinion in connection with the Order complained of justifying his action in denying confirmation on the ground that the Debtor obtained a Discharge in Bankruptcy in this Court on June 29, 1959. The present proceeding was commenced on August 8, 1963.

The question of whether the six-year limitation on successive proceedings under the Bankruptcy Act is applicable to wage earners' plans is by no means settled by the judicial authorities, nor is it expressly resolved by the language of the Act. This judge is of the view, however, that the Opinion of the Referee is correct and that it should be affirmed.

Section 656 of the Act (11 U.S.C. 1056) provides that the court shall confirm a wage earner's plan if, among other conditions, the debtor has not been guilty of any act which would be a bar to the discharge of a bankrupt. A discharge within six years prior is, of course, a bar to a discharge in bankruptcy. 11 U.S.C. 32(c) (5). A number of cases, represented by *In re Holmes,* 10th Cir., 309 F. 2d 748 (1962), have been decided on the view that a wage earner's

plan in the nature of an extension should not be barred by a prior discharge because it is so different in purpose from the relief afforded by straight bankruptcy. This reasoning is open to the criticism, however, that there should be no accounting for the purpose of legislation except to resolve ambiguity in the language used therein.

The use of the word "guilty" in section 656(a) (4) in referring to the conduct which bars confirmation of a wage earner's plan may perhaps lead to the thought that only conduct which is inherently represensible is comprehended by the provision. The appearance of this word here is accidental. The language of the section is a carryover from the corresponding provision in Chapter 11 relating to compositions. This chapter was enacted in 1874, a time when the bars to discharge embraced only offenses under the Bankruptcy Act punishable by imprisonment and the destruction or concealment of records. This would provide a suitable context for the word "guilty" and when prior discharge was added to these bars, the phraseology was not changed, possibly through negligent draftsmanship. See *In re Goldberg,* 6th Cir., 53 F. 2d 454 (1931).

The opinion in *In re Holmes, supra,* does not specify the reason for resorting to the general purpose of the legislation as an aid to construction. This decision along with those in *In re Sharp,* W.D. Mo., 205 F. Supp. 786 (1962) and *In re Mahaley,* S.D. Calif., 187 F. Supp. 229 (1960), does well to some extent on section 602 of the Act (11 U.S.C. 1002) which incorporates by reference into Chapter 13 as much of Chapters 1 to 7 as is not inconsistent with the provisions of Chapter 13. But this is only one possible means of carrying the six-year limitation into the matter of confirming wage earners' plans and a general finding of inconsist-

ency of purpose would seem to have no application beyond consideration of how this particular section should operate. The more immediate concern is with the effect of Section 656(a) (4) which states that no more nor less than that whatever is a bar to a discharge in bankruptcy is a bar to the confirmation of a wage earner's plan.

This judge is supported by the case of *In re Schlageter,* 3rd Cir., 319 F. 2d 831 (1963) which holds that a discharge in bankruptcy not more than six years earlier is a bar to the confirmation of a wage earner's plan. The opinion is largely directed to the debtor's argument that since his plan only contemplated an extension, and all debts would eventually be paid in full, the six-year limitation would be inappropriate. The Court reasoned that no wage earner's plan can be characterized as a simple extension because by operation of Section 661 (11 U.S.C. 1061), the debtor may be discharged at the end of three years if his failure to pay all his debts is due to circumstances beyond his control.

This Court is also bound by the reasoning of the Court of Appeals for the Sixth Circuit in *In re Goldberg, supra.* The question there was whether a composition under Chapter 11 of the Act could be confirmed when the debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a discharge in bankruptcy. The Court never questions whether the six-year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior discharge in bankruptcy.

An Order is entered this day affirming the Opinion of the Referee and dismissing the Petition for Review.

/s/ MAC SWINFORD
Judge

January 20, 1964.

APPENDIX "C"

OPINION AND JUDGMENT OF THE SIXTH CIRCUIT COURT OF APPEALS

No. 15809

(Decided January 25, 1965.)

Before WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.*

PER CURIAM. Perry, the debtor, filed in the District Court a Wage Earner Plan under Chapter XIII of the Bankruptcy Act, 11 U.S.C. §§ 1001-1086. His petition revealed, however, that he had previously filed a petition in bankruptcy within six years of filing the Wage Earner Plan and had been granted a discharge. The referee, for that reason, denied his application for confirmation of the plan and upon motion of a creditor dismissed the petition. This ruling was affirmed by the District Judge upon review of the referee's order.

The only question before us is whether the previous bankruptcy within six years barred confirmation of the plan and warranted dismissal of the case.

In order to confirm the plan, the court must be satisfied among other things, that "the debtor has not been guilty of any of the acts or failed to perform any of the duties

* Sitting by designation from the U. S. District Court Western District of Michigan.

which would be a bar to the discharge of a bankrupt." 11 U.S.C. § 1056 (3).

A discharge within six years operates as a bar to the discharge of a bankrupt. 11 U.S.C. § 32(c) (5).

The plain language of the Act prevented the court from confirming the plan in the present case. The fact that a Wage Earner Plan seeking an extension of time to pay the indebtedness was involved, instead of another ordinary bankruptcy case, was immaterial. The statutory bar existed in either case.

If proceedings of this type are to be exempted from the provisions of Section 32(c) (5), such exemption should be made by Congress and not by the courts. The National Bankruptcy Conference has proposed amendments to the Act which would permit the filing of such proceedings within six years. See Proceedings of Nat'l Bankruptcy Conf. 1961 Ann. Meeting, Res. No. 2, and Proceedings of Nat'l Bankruptcy Conf. Ann. Meeting of October 25-26, 1962.

Our views are supported by *In the Matter of Schlageter,* 319 F.2d 821 (C.A. 3, 1963); *In re Jensen,* 200 F.2d 58 (C.A. 7, 1952); *In the Matter of Fontan,* 227 F.Supp. 973 (S.D. Miss. 1964); *In the Matter of Nicholson,* 224 F.Supp. 773 (D. Ore. 1963); *In the Matter of Bingham,* 190 F. Supp. 219 (D. Kan. 1960), *aff'd.* 297 F.2d 341.

There are other decisions, which we do not follow, that have reached a contrary result. *Edins* v. *Helzberg's Diamond Shops, Inc.,* 315 F.2d 223 (C.A. 10, 1963); *In re Sharp,* 205 F.Supp. 786 (W.D. Mo. 1962); *In the Matter of Mahaley,* 187 F.Supp. 229 (S.D. Cal. 1960); *In the Matter of Verlin,* 148 F.Supp. 660 (E.D. N.Y. 1957), *aff'd* 255 F.2d 682 (C.A. 2, 1958). In our opinion the statute is not susceptible to the construction given it in these cases.

Affirmed.

FILE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 694

WARREN W. PERRY,

Petitioner,

vs.

COMMERCE LOAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 694

WARREN W. PERRY,

Petitioner,

vs.

COMMERCE LOAN COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 340 F.2d 588. The memorandum opinion and order of the District Court is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was dated and entered on January 25, 1965 (R. 21-22). The Petition for a

Writ of Certiorari was filed on April 24, 1965, and was granted October 25, 1965 (R. 23).

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U.S. Code, Section 1254 (1).

Question Presented

The question presented is whether a discharge in bankruptcy received within six years prior to the filing of a proceeding for relief under Chapter XIII of the Bankruptcy Act, constitutes a bar to confirmation of a Wage Earner Plan, the sole purpose of which was to obtain for the wage earner an extension of time within which to pay his debts in full.

Statutes Involved

The relevant statutory provisions are as follows:

> Title 11. U.S.C.A. Sec. 1056(a) "The Court shall confirm the plan if satisfied that—(3) The Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt;"
>
> Title 11. U.S.C.A. Sec. 32(c) "The Court shall grant the discharge unless satisfied that the bankrupt has—(5) in a proceeding under this title commenced within six years prior to the date of the filing of the Petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner plan by way of composition confirmed under this title;"

Title 11. U.S.C.A. Sec. 1060 "Upon compliance by the debtor with the provisions of the plan and upon completion of all payments to be made thereunder, the Court shall enter an order discharging the debtor from all his debts and liabilities provided for by the plan, but excluding such debts as are not dischargeable under Section 35 of this title held by creditors who have not accepted the plan."

Title 11. U.S.C.A. Sec. 1061 "If at the expiration of three years after the confirmation of a plan, the debtor has not completed his payments thereunder, the Court may nevertheless, upon the application of the debtor and after hearing upon notice, if satisfied that the failure of the debtor to complete his payments was due to circumstances for which he could not be justly held accountable, enter an order discharging the debtor from all his debts and liabilities provided for by the plan, but excluding such debts as are not dischargeable under Section 35 of this title held by creditors who have not accepted the plan."

Statement of Case

Petitioner, a resident of Kentucky, on August 8, 1963, filed a Wage Earner Plan under Chapter XIII of the Bankruptcy Act and filed an application for confirmation of his plan. The debtor listed total debts of $1412.00 plus Trustee's administration expenses and attorney fees estimated at $250.00. He proposed to pay $60.00 per month to the Trustee, and since his plan called for 100% payment of both secured and unsecured debts, the plan was one of extension whereby his debts would be paid in full and the plan would

have been completed within twenty-eight months after confirmation.

Upon examination of the debtor, when the case came on for hearing, on September 12, 1963, it was revealed that the debtor had filed a prior bankruptcy proceeding in the same Court on May 20, 1959, and had received a discharge on June 29, 1959. Commerce Loan Company, one of the creditors, listed in the Chapter XIII petition, objected to confirmation of the Plan because the debtor had received a discharge in a bankruptcy proceedings filed within six years next preceding the filing of the Chapter XIII petition. The Referee denied debtor's application for confirmation of his plan and sustained the motion to dismiss the petition. Petition for review was filed by the debtor and the District Court dismissed the petition for review and affirmed the Referee's order denying confirmation of the debtor's wage earner plan (R. 15). Upon appeal to the Court of Appeals for the Sixth Circuit, the dismissal was affirmed, the Court holding that the discharge within six years operated as a bar to confirmation of the plan and that the fact that the Wage Earner Plan was one seeking an extension of time to pay the indebtedness instead of another bankruptcy case, was immaterial. The Court recognized the conflicting decisions of the several Circuits but followed the decisions of *In the Matter of Schlageter,* 319 F.2d 821 (C.A. 3, 1963) and *In re Jensen,* 200 F.2d 58 (C.A. 7, 1952) and rejected the reasoning of *Edins* v. *Helzberg's Diamond Shops, Inc.,* 315 F.2d 223 (C.A. 10, 1963) and *In re Verlin,* 148 F. Supp. 660 (E.D.N.Y. 1957), aff'd 225 F.2d 682 (C.A. 2, 1958) (R. 19-22).

It is the contention of petitioner that when Section 14c(5) of Chapter III of the Bankruptcy Act, 11 U.S.C.A. Section

32(c) (same) was enacted by Congress, it was not intended that a prior discharge in bankruptcy within six years of the filing of a Wage Earner extension plan would bar confirmation of such plan. Since the so-called "guilt" statute, referred to above, mentions a discharge in bankruptcy, a composition, or an arrangement by way of composition, or a Wage Earner Plan by way of composition, and omits mention of a plan by way of extension, it becomes material that the present plan contemplates payment in full to both secured and unsecured creditors and this is by way of extension only, and not composition.

Argument

It is laudable and understandable that the Bankruptcy Act wisely bars a bankrupt from a discharge if he has within six years previously received a prior discharge in bankruptcy, the purpose being to prevent "the creation of a class of habitual bankrupts, . . . (i.e.), debtors going through bankruptcy and escaping payment of their debts whenever and as frequently as they chose." *In Re Thompson,* 51 F. Supp. 12, 13 (W.D. Va. 1943), quoted by Judge Clarke in his opinion in *In Re Mahaley,* 187 F. Supp. 229 (S.D. Cal. 1960), and by Judge Oliver in his opinion in *In Re Sharp,* 205 F. Supp. 786 (W.D. Mo. 1962).

The problem now presented is what recourse is there to one who has had to resort to bankruptcy, and who, within six years has again found himself in financial difficulty? He is faced with the threat of garnishment and attachment of his weekly pay check. His employment is threatened, and his job will be terminated and his earning capacity ended, unless he obtains relief from such attachment. To

be sure, he must take a portion of the blame for his improvidence but this unfortunate economic dilemma, multiplied thousands of times throughout the country, is encouraged by modern sales pressures and installment buying preying on man's natural desire to enjoy all the abundance of goods that are made available by this great industrial nation. In order to relieve his plight and to keep this man as an active and productive member of society rather than have him forced upon the charity rolls, some relief, other than straight bankruptcy, must be available.

The question now before the Court is whether the problem presented by this cause was anticipated and specifically provided for by the enactment of Chapter XIII of the Bankruptcy Act, entitled Wage Earner's Plans (U.S. C.A. Title 11, Secs. 1001-1086) and adopted in 1938 as part of the Chandler Act. These Wage Earner proceedings, as an alternative to bankruptcy, have been successful and popular in certain districts. For example, in Cincinnati, Ohio, the recent statistics reveal that over a period of approximately four years, about 2800 wage earner plans have been filed at the Cincinnati office in the U.S. District Court for the Southern District of Ohio. In a recent report made public by William R. Schumacher, Trustee, it is revealed that over said period his office has paid out $2,000,000.00 to creditors; that in the fiscal year ending July, 1965, $963,000.00 was paid to creditors and that at the present time disbursements average $100,000.00 per month. This figure indicates the economic benefit to society derived through Chapter XIII proceedings. It is significant that when Chapter XIII cases are successfully concluded, the creditors are paid almost 100%, while statistics show that approximately 85% of all straight bankruptcies are

either no asset or nominal asset cases from which no dividend is available to creditors.

Although it must be borne in mind that petitioners under Chapter XIII are not seeking to avoid their debts, but are seeking the assistance of the Court in an effort to pay their debts, and that this is praiseworthy from a social or philosophical approach, yet a Referee in Bankruptcy is bound by the limits of the Bankruptcy Act.

The chief limitation upon approval of a confirmation of a plan in a Chapter XIII proceeding is found in Title 11, U.S.C.A. Sec. 1056 (3):

> "The Court shall confirm a plan if satisfied that . . . (3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt."

Section 14c of the Bankruptcy Act, Title 11, U.S.C.A. Section 32 states the grounds upon which a discharge in bankruptcy shall be denied and subsection 5 reads as follows:

> "The Court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under the Act commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act."

It should be noted that the reference to a wage earner's plan in subsection 5 refers only to a composition, or

arrangement by way of composition as opposed to an extension. It logically follows that the omission of the mention of a plan by way of extension implies that Congress meant to exclude such a proceeding. The Court in *Edins* v. *Helzberg's Diamond Shops, Inc.*, 315 F.2d 223 (C.A. 10, 1963) determined that the provisions of Section 32 (c)(5) can, under a literal reading thereof, apply only to a petition in straight bankruptcy or to an arrangement or composition; that a Wage Earner Plan by way of extension is a special proceeding and is specifically omitted by the section.

The Second Circuit in deciding *Fishman* v. *Verlin*, 255 F.2d 682 (C.A. 2, 1958), also held that an extension agreement does not fall within the statutory bar.

Another case decided by the Tenth Circuit, *In Re Holmes*, 309 Fed. 2d 748 (C.A. 10, 1962) emphasized the decisively significant distinction drawn by Congress between compositions and extensions, and held that the statutory bar of discharge was not intended to apply to wage earners seeking extension of time to pay their debts in full and the fact that the wage earner had availed himself of a like plan within the preceding six years would not justify dismissal of the proceeding.

A discharge is obtainable under Chapter XIII in one of two ways: (1) by Section 1060 of Title 11, U.S.C.A. upon completion of all payments under a plan and compliance with its provisions; (2) by Section 1061 of Title 11, U.S. C.A., at the expiration of three years after confirmation notwithstanding the debtor's failure to complete his payments thereunder if the Court is satisfied that the failure was due to circumstances for which the debtor could not be

justly held accountable. Reading these two sections in conjunction with Sections 1056(a)(3) and 32(c)(5) *supra,* it appears that so far as its express words are concerned, Congress evidenced only a purpose to exclude confirmed extensions from the list of bars to subsequent relief dispensed by the bankruptcy Court. In fact, it would seem that any discharge after less than full payment would come fully within the dominant purpose underlying Section 32(c)(5).

In the case of *In Re Schlageter,* 319 Fed. 2d 821 (C.A. 3, 1963), a strict interpretation of the Act in question was applied and confirmation of the plan was denied. The Court reasoned that a Wage Earner Plan could not be characterized as a simple extension because by operation of statute, the debtor may be discharged at the end of three years if his failure to pay all his debts is due to circumstances beyond his control. At first blush, this appears to be a good point, but an answer to this contention is that if such a situation occurred (and this is a rare occasion), the creditor who did not receive payment in full could, at that time, make proper opposition on the grounds that relief was tantamount to a second discharge in bankruptcy within six years.

Petitioner submits that the phrase "a plan shall not be confirmed if the debtor has been guilty of any of the acts or failed to perform any of the duties which would bar a discharge in bankruptcy" as employed in Section 1056(3) *supra,* should not be construed as a careless or casual selection of words. Reference to Section 32(c) *supra,* discloses that with the single exception of subparagraph 5, all of the subsections indicate wrongful acts. Webster's New International Dictionary defines guilt as "offense; sin; fault." It is incomprehensible that the term "guilt"

could be applied to a legal proceeding maintained in an established court of law where the relief sought is not a discharge of indebtedness, but only an orderly method of the amortization of indebtedness. The exclusion of the phrase "wage earner plan by way of extension" from Section 32(c)(5) indicates that Congress did not intend that a prior discharge in bankruptcy would be a bar to such relief.

Conclusion

Petitioner submits that the present proceeding is not based upon a petition in bankruptcy; neither is it a composition nor an arrangement by way of composition nor a wage earner plan by way of composition. It is a special proceeding whereby the debtor seeks an extension of time to pay all of his debts in full. The provisions of Section 32(c)(5) *supra,* apply only to those proceedings specifically referred to therein and not to a wage earner plan by way of extension. This interpretation is not only legally consistent with the Bankruptcy Act but also agrees with the better philosophical and sociological solution to the problem.

Because the United States Court of Appeals has erroneously interpreted the Statutes involved in this cause, its decision should be reversed.

Respectfully submitted,

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JOHN F. DAVIS, CLE

No. 694

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

WARREN W. PERRY,
Appellant,

vs.

COMMERCE LOAN COMPANY,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF WITH APPENDICES FOR APPELLEE

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In the

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF WITH APPENDICES FOR APPELLEE

OPINIONS AND JUDGMENTS BELOW

The opinion and Order of the Referee, and the Opinion and Order of the United States Court are not reported, but may be found as Appendices to this Brief. The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit are reported in 340 F.(2d) 588, and are appended hereto.

JURISDICTION

Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit, which the Appellant herein seeks to have this Court review, is dated January 25, 1965, and may be found in the Record at Pages 19-21. Petition for Writ of Certiorari on behalf of Appellant was filed October 25, 1965. (R. 23).

Jurisdiction to review the Judgment of the United States Court of Appeals is conferred on this Court by provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

The question presented is whether a Discharge in Bankruptcy received within six years prior to a proceeding for relief under Chapter XIII of Bankruptcy Act constitutes a bar to confirmation of a Wage Earner Plan.

All three Courts from which this Petition is here presented on Appeal for Writ of Certiorari, have held that the Debtor was guilty of certain acts or failed to perform certain duties which would be a bar to his Discharge in Bankruptcy. 11 U.S.C., Sec. 1056 (3). Said Courts further held that by the language of 11 U.S.C. Sec. 32 (C) (5), providing that a Discharge within six years operates as a bar to a Discharge of the Bankrupt, prevented the Courts from confirming the Plan in the instant case.

The initial proceeding was commenced on August 8, 1963. The issue is complicated by the fact that the United States Court of Appeals for the Tenth and Third Circuits have reached opposite conclusions on the matter of Law presented. The Sixth Circuit has now held with the Third Circuit on this question.

PROPOSITIONS AND AUTHORITIES

The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of Chapters 1 to 7 inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter apply in Proceedings under this chapter . . ." (U.S.C.A. Sec. 1002)
>
> "Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges, and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)
>
> "Sec. 656(a). The court shall confirm the plan if satisfied that—
>
> * * *
>
> (3) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . ." (11 U.S.C.A. Sec. 1056)

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

> "Sec. 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy been granted a discharge, or had a composition or a wage earner's plan by way of composition confirmed under this Act . . ." (11 U.S.C.A. Sec. 32, sub. c.)

We respectfully invite this Court's attention and consideration to the following cases, viz:

In re: Schlageter, 3rd Cir., 319 F.2d 821 (1963);
In re: Goldberg, 6th Cir., 53 F.2d 454 (1931), and
In re: Helen Christine Nicholson, Debtor, U. S. Dis. Court, D. Oregon, (Oct. 25, 1963) Fed. Supp. 224, p. 773.

The *Schlageter* case, cited above, holds that a Discharge in Bankruptcy, not more than six years earlier, is a bar to the confirmation of a Wage Earner's Plan. The opinion is largely directed to the Debtor's argument that since his plan only contemplated an extension, and all debts would eventually be paid in full, the six year limitation would be inappropriate. The Court reasoned that no Wage Earner's Plan can be characterized as a simple extension, because by operation of Sec. 661 (11 U.S.C.A. 1061), the Debtor may be discharged at the end of three years, if his failure to pay all his debts is due to circumstances beyond his control.

In the *Goldberg* case cited, *supra,* the question there was whether a composition of Chapter 11 of the Act could be confirmed when the Debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a Discharge in Bankruptcy. The court never questions whether the six year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior Discharge in Bankruptcy.

In the *Nicholson* case cited, *supra,* the two secured creditors and all of the unsecured creditors who had filed claims, accepted the plan, and consequently, no objection

whatsoever was offered by any of the creditors, notwithstanding the fact that they had full knowledge of the prior bankruptcy, and a discharge in connection therewith within the six year period prior to the commencement of the debtor petition under Chapter XIII. The Referee, nevertheless, entered an Order denying confirmation and dismissed the proceeding on the ground that petitioner had been granted a Discharge in Bankruptcy within six years next preceding the filing of Chapter XIII Petition. An appeal was prosecuted to District Judge Kilkenny with the result that the Referee's decision was affirmed. Judge Kilkenny discusses at great length in his opinion the applicable principles of law, and we respectfully invite this Court's attention to same.

A most recent Decision handed down by the United States District Court may be found in Fed. Supp. 227, Page 973. *In the matter of John E. Fontan, Debtor,* Case No. 2303-B, Southern District of Mississippi. This Decision takes the same position on the proposition involved as Authorities heretofore cited by the Appellee herein.

ARGUMENT

Until the intervention of this Decision by the Referee and the succeeding Affirming Courts designated herein, it was frequent practice for Debtors in straight bankruptcy actions to seek discharge from their obligations and within a period of two to six months thereafter incur other indebtedness and then file a Petition under Chapter XIII, thereby seeking to relieve and release themselves from their newly found liabilities. Such persons became known, in Lawyer's parlance as "repeaters," who apparently were not seeking the honest protection of the Law but to defraud their creditors, whenever and wherever the opportunity

arose. We concur in the expressed Opinion of the learned Judge, Mac Swinford, in a bankruptcy case on record in the United States Court, Eastern District of Kentucky, at Covington, known and designated as the *Edward Louis Ott* matter, in which Judge Swinford said:

> "Bankruptcy is essentially an equitable proceeding, and there is no place in our system of jurisprudence where open and above board dealings are more essential. The Law is willing to relieve an oppressed debtor of his debts where he, himself, has come into Court with clean hands."

RELIEF

It is respectfully urged that the conclusion to be reached herein is supported by provisions of Section 606 of the Act, to the effect that the rights, privileges and duties of the Debtor, under Chapter XIII Proceedings, are the same as those of a Bankrupt. It would appear to follow that a right to a discharge is a prerequisite to the right to have a Wage Earner Plan confirmed. Accordingly, if the Debtor, under Chapter XIII was in no position to receive a Discharge by reason of having received the same within a period of six years previous to the Chapter XIII Proceedings, that his Application for Confirmation of Plan and his Petition in connection therewith should be, upon Motion duly made, as was done in this case, dismissed.

It is respectfully submitted and urged to this Court that the Rulings made by the numerous Courts herein cited embody the correct theory of the Law; and, for the reasons as cited in this Brief, we respectfully pray that the Con-

clusions, Decisions and Judgments heretofore reached by said Courts be Affirmed; that the Review thereof be denied, and this Appeal dismissed; and for all proper relief to which the Appellee herein may be entitled in the premises.

Respectfully submitted,

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APPENDIX "A"

OPINION AND ORDER OF HON. JOE LEE, REFEREE

This matter is pending upon the application of the debtor for confirmation of his wage earner plan under Chapter XIII of the Bankruptcy Act, and upon the countermotion of Commerce Loan Company of Covington, a creditor, to dismiss the debtor's petition. Dismissal is sought on the ground the debtor obtained a discharge in bankruptcy in a proceeding in this court commenced within six years prior to the date of the filing of the petition under Chapter XIII. The records of this court reveal the debtor filed a petition in straight bankruptcy on May 20, 1959, case No. 1679, and obtained a discharge in bankruptcy therein on June 29, 1959. The present proceeding was filed August 8, 1963.

The question presented is whether relief under Chapter XIII for a wage earner plan is barred by the fact the debtor has been granted a discharge in bankruptcy in a proceeding filed within six years next preceding the filing of the petition under Chapter XIII.

The issue is complicated by the fact the United States Courts of Appeal for the Tenth and Third Circuits have reached opposite conclusions on the matter. See Edins vs. Helzberg's Diamond Shops, Inc., C.A. 10, 315 F. 2d 223, decided April 5, 1963, holding a debtor is entitled to relief by means of a wage earner plan under Chapter XIII under such circumstances, and In re Schlageter, C.A. 3, 319 F. 2d 821, decided July 5, 1963, holding he is not.

The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not in-

consistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . ." (11 U.S.C.A. Sec. 1002)

"Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)

Sec. 656(a). The court shall confirm the plan if satisfied that—

* * *

(3) The debtor has not been *guilty* of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . ." (11 U.S.C.A. Sec. 1056) (Italics added).

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

"Sec. 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . ." (11 U.S.C.A. Sec. 32, sub. c.)

A provision similar to Section 656(a) (3), supra, appears in Chapter XI, Sec. 366(3) of the Act. The United States Court of Appeals for the Sixth Circuit had occasion to construe this latter provision in the case of In re Goldberg,

53 F. 2d 454, 80 A.L.R. 399. A careful reading of that opinion convinces the court that, while there was disagreement on other grounds, both the majority and minority opinions are in accord on the proposition that all the prohibitive clauses of Sec. 14c are incorporated by reference in Sec. 366(3). In the majority opinion the court said at page 455:

> ". . . The applicable portion thereof is section 12d (11 U.S.C.A. Sec. 30(d), to-wit: that 'the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith.' This paragraph originated with the Act, and Congress has never disturbed it. It is not difficult to determine what 'acts' and 'duties' were referred to in clause (2). They are those acts and duties found in clauses (1) and (2) of section 14b of the original Act. Section 14b has been amended from time to time until it now stands as printed in the margin. By its provisions, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its numbered clauses. See Bluthenthal v. Jones, 208 U.S. 64, 65, 28 S. Ct. 192, 52 L. ed 390; In re Jacobs, 241 F. 260, 624 (C.C.A. 6). *Section 12d(2) denies the composition upon the same grounds; that is, if the bankrupt has been guilty of any of the acts or failed to perform any of the duties specified in section 14b, as it now stands,* which would be a bar to his discharge. If appellant is denied confirmation of the composition he has made with his creditors, it can only be because he is guilty of the offense of applying for such an order within six years after he 'has been granted a discharge in bankruptcy.' See clause (5) of Section 14b . . ." (Italics supplied).

While there is other language in the majority opinion which might be interpreted as modifying the postulate that Sec. 12d(2), now Sec. 366(3) incorporates by reference all of Sec. 14b, now Sec. 14c, as implied in the above-quoted language, it would appear the court was simply emphasizing that the appellant could not be deemed guilty of committing the offense of having been granted a discharge in bankruptcy since it was not clear Congress intended the confirmation of a composition to be the equivalent of a discharge in bankruptcy. By subsequent amendment of the Act, Congress has made it clear that confirmation of a composition and a discharge in bankruptcy are equivalent. Act of 1938; Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 14.01, page 1252. But the hypothesis that Sec. 366(3) incorporates by reference all of Sec. 14c remains sound.

The various debtor relief chapters are in pari materia. Hellenbeck vs. Penn Mutual Life Insurance Co., Bankruptcy Law Reporter No. 221, Oct. 29, 1963, CCH 60,957. If Sec. 366(3) of Chapter XI incorporates by reference all of Sec. 14c of Chapter III, it follows that Sec. 356(a) of Chapter XIII does likewise, with the result that confirmation of a wage earner plan is precluded if the debtor has been granted a discharge in bankruptcy in a proceeding commencing within six years prior to the date of filing of the petition under Chapter XIII.

As stated by the court in Re Greenman, 10 F. Supp. 452, at page 453: "It seems to me more reasonable to believe that when Congress provided that the debtor's composition should be confirmed unless he had 'been guilty of any of the acts or failed to perfrom any of the duties which would be a ground for denying his discharge,' it was nothing but a rather slipshod way of saying that the debtor should

have his composition confirmed (and thus be discharged) unless he had by his own act placed himself in a position where he could not receive a discharge under Section 14 in any ordinary bankruptcy." Since the language of Sec. 366(3) and 356(3) are similar it would seem Congress intended that a wage earner plan either by way of composition or extension should not be confirmed unless the debtor is entitled to a discharge in bankruptcy.

There is authority for the view that Section 14c(5) is inconsistent or in conflict with the provisions of Chapter XIII and therefore inapplicable to wage earner proceedings. If this view is valid a prior discharge would not even bar a subsequent wage earner plan by way of composition. See In re Kornbluth, C.A. 2, 65 F. 2d 400, at page 403.

In In re Mahaley, 187 F. Supp. 229, (1960) and In re Sharp, 205 F. Supp. 786 (1962), it was concluded that the *purposes* underlying Sec. 14, sub. c(5) of the Bankruptcy Act are so inconsistent with the *purposes* underlying relief by way of extension under Chapter XIII as to make said section inapplicable in Chapter XIII proceedings. The word *purposes* is underlined to emphasize there was no finding of inconsistency or conflict in specific language. It is worth noting that Sec. 602 of the Act provides that Chapters 1 to 7 shall apply insofar as they are not inconsistent or in conflict with the *provisions* of Chapter XIII. This would seem to require a finding of inconsistency or conflict in rather specific provisions rather than in purposes.

The conclusion herein is buttressed by the provision in Section 606 of the Act, not referred to in the *Mahaley* or *Sharp* cases, to the effect that the rights, privileges and duties of the debtor are the same as those of a bankrupt. It would seem therefore that a right to a discharge is a prerequisite to the right to have a wage earner plan confirmed.

Accordingly, the debtor's application for confirmation of his plan should be, and hereby is, denied, and the motion of Commerce Loan Company to dismiss the petition should be, and hereby is, sustained.

IT IS ORDERED that copies of this Opinion and Order be served by mail upon the parties shown below.

At Lexington, Kentucky, this December 2, 1963.

/s/ JOE LEE
Referee in Bankruptcy

APPENDIX "B"

MEMORANDUM (OPINION) OF HON. MAC SWINFORD, JUDGE

The wage earner has filed a Petition for Review of an Order of the Referee denying his application for confirmation of his wage earner plan and dismissing his petition. The Referee wrote an Opinion in connection with the Order complained of justifying his action in denying confirmation on the ground that the Debtor obtained a Discharge in Bankruptcy in this Court on June 29, 1959. The present proceeding was commenced on August 8, 1963.

The question of whether the six-year limitation on successive proceedings under the Bankruptcy Act is applicable to wage earners' plans is by no means settled by the judicial authorities, nor is it expressly resolved by the language of the Act. This judge is of the view, however, that the Opinion of the Referee is correct and that it should be affirmed.

Section 656 of the Act (11 U.S.C. 1056) provides that the court shall confirm a wage earner's plan if, among other conditions, the debtor has not been guilty of any act which would be a bar to the discharge of a bankrupt. A discharge

within six years prior is, of course, a bar to a discharge in bankruptcy. 11 U.S.C. 32(c) (5). A number of cases, represented by *In re Holmes,* 10th Cir., 309 F. 2d 748 (1962), have been decided on the view that a wage earner's plan in the nature of an extension should not be barred by a prior discharge because it is so different in purpose from the relief afforded by straight bankruptcy. This reasoning is open to the criticism, however, that there should be no accounting for the purpose of legislation except to resolve ambiguity in the language used therein.

The use of the word "guilty" in section 656(a) (4) in referring to the conduct which bars confirmation of a wage earner's plan may perhaps lead to the thought that only conduct which is inherently reprehensible is comprehended by the provision. The appearance of this word here is accidental. The language of the section is a carryover from the corresponding provision in Chapter 11 relating to compositions. This chapter was enacted in 1874, a time when the bars to discharge embraced only offenses under the Bankruptcy Act punishable by imprisonment and the destruction or concealment of records. This would provide a suitable context for the word "guilty" and when prior discharge was added to these bars, the phraseology was not changed, possibly through negligent draftsmanship. See *In re Goldberg,* 6th Cir., 53 F. 2d 454 (1931).

The opinion in *In re Holmes, supra,* does not specify the reason for resorting to the general purpose of the legislation as an aid to construction. This decision along with those in *In re Sharp,* W.D. Mo., 205 F. Supp. 786 (1962) and *In re Mahaley,* S.D. Calif., 187 F. Supp. 229 (1960), does well to some extent on section 602 of the Act (11 U.S.C. 1002) which incorporates by reference into Chapter 13 as much of Chapters 1 to 7 as is not inconsistent with the provisions of Chapter 13. But this is only one possible

means of carrying the six-year limitation into the matter of confirming wage earners' plans and a general finding of inconsistency of purpose would seem to have no application beyond consideration of how this particular section should operate. The more immediate concern is with the effect of Section 656(a) (4) which states that no more nor less than that whatever is a bar to a discharge in bankruptcy is a bar to the confirmation of a wage earner's plan.

This judge is supported by the case of *In re Schlageter,* 3rd Cir., 319 F. 2d 831 (1963) which holds that a discharge in bankruptcy not more than six years earlier is a bar to the confirmation of a wage earner's plan. The opinion is largely directed to the debtor's argument that since his plan only contemplated an extension, and all debts would eventually be paid in full, the six-year limitation would be inappropriate. The Court reasoned that no wage earner's plan can be characterized as a simple extension because by operation of Section 661 (11 U.S.C. 1061), the debtor may be discharged at the end of three years if his failure to pay all his debts is due to circumstances beyond his control.

This Court is also bound by the reasoning of the Court of Appeals for the Sixth Circuit in *In re Goldberg, supra.* The question there was whether a composition under Chapter 11 of the Act could be confirmed when the debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a discharge in bankruptcy. The Court never questions whether the six-year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior discharge in bankruptcy.

An Order is entered this day affirming the Opinion of the Referee and dismissing the Petition for Review.

/s/ MAC SWINFORD
Judge

January 20, 1964

APPENDIX "C"

OPINION AND JUDGMENT OF THE SIXTH CIRCUIT COURT OF APPEALS

No. 15809

(Decided January 25, 1965.)

Before WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.*

PER CURIAM. Perry, the debtor, filed in the District Court a Wage Earner Plan under Chapter XIII of the Bankruptcy Act, 11 U.S.C. §§ 1001-1086. His petition revealed, however, that he had previously filed a petition in bankruptcy within six years of filing the Wage Earner Plan and had been granted a discharge. The referee, for that reason, denied his application for confirmation of the plan and upon motion of a creditor dismissed the petition. This ruling was affirmed by the District Judge upon review of the referee's order.

The only question before us is whether the previous bankruptcy within six years barred confirmation of the plan and warranted dismissal of the case.

In order to confirm the plan, the court must be satisfied among other things, that "the debtor has not been guilty of any of the acts or failed to perfrom any of the duties

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* Sitting by designation from the U. S. District Court Western District of Michigan.

which would be a bar to the discharge of a bankrupt." 11 U.S.C. § 1056 (3).

A discharge within six years operates as a bar to the discharge of a bankrupt. 11 U.S.C. § 32(c) (5).

The plain language of the Act prevented the court from confirming the plan in the present case. The fact that a Wage Earner Plan seeking an extension of time to pay the indebtedness was involved, instead of another ordinary bankruptcy case, was immaterial. The statutory bar existed in either case.

If proceedings of this type are to be exempted from the provisions of Section 32(c) (5), such exemption should be made by Congress and not by the courts. The National Bankruptcy Conference has proposed amendments to the Act which would permit the filing of such proceedings wtihin six years. See Proceedings of Nat'l Bankruptcy Conf. 1961 Ann. Meeting, Res. No. 2, and Proceedings of Nat'l Bankruptcy Conf. Ann. Meeting of October 25-26, 1962.

Our views are supported by *In the Matter of Schlageter,* 319 F. 2d 821 (C.A. 3, 1963); *In re Jensen,* 200 F.2d 58 (C.A. 7, 1952); *In the Matter of Fontan,* 227 F.Supp. 973 (S.D. Miss. 1964); *In the Matter of Nicholson,* 224 F.Supp. 773 (D. Ore. 1963); *In the Matter of Bingham,* 190 F. Supp. 219 (D. Kan. 1960), *aff'd.* 297 F.2d 341.

There are other decisions, which we do not follow, that have reached a contrary result. *Edins* v. *Helzberg's Diamond Shops, Inc.,* 315 F.2d 223 (C.A. 10, 1963); *In re Sharp,* 205 F.Supp. 786 (W.D. Mo. 1962); *In the Matter of Mahaley,* 187 F.Supp. 229 (S.D. Cal. 1960); *In the Matter of Verlin,* 148 F.Supp. 660 (E.D. N.Y. 1957), *aff'd* 255 F.2d 682 (C.A. 2, 1958). In our opinion the statute is not susceptible to the construction given it in these cases.

Affirmed.

FILED
APR 1 1 1966

No. 898

In the

SUPREME COURT OF THE UNITED STATES

October Term 1965

WARREN W. PERRY,

Petitioner,

v.

COMMERCE LOAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARI

R. HOWARD SMITH,
Lawyers Building
Newport, Kentucky
Attorney for Commerce Loan Company

COURT REPORTER PRESS, INC. — Law Printers — [illegible]

In the

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 694

WARREN W. PERRY,

Petitioner,

v.

COMMERCE LOAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING PURSUANT TO RULE 58

Comes Commerce Loan Company, by counsel, and petitions the Court for a rehearing of the decision of the Court rendered herein on March 7, 1966, and as grounds therefor states as follows:

POINT ONE

In Part I of its opinion the Court lauds the Chapter XIII remedy as a desirable *alternative* to straight bankruptcy. Certainly. But this obscures the issue. The issue is whether Congress intended Chapter XIII debtor relief proceedings to be available as a remedy *in addition to bankruptcy*. Most certainly not. Perry had the choice of Chapter XIII relief as an *alternative* to straight bankruptcy in 1959 and took

the straight bankruptcy route. Subsequently, he sought relief in this proceeding under Chapter XIII *in addition to* the relief already afforded him in straight bankruptcy. The *alternative* of bankruptcy was no longer available to him. No one is arguing with the concept that "Congress clearly intended to encourage wage earners to pay their debts in full, rather than go into straight bankruptcy," or that Congress has recognized that Chapter XIII is a highly desirable and "feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy." What we are questioning is the fact the Court has somehow deduced from a 1959 House of Representatives Report expressing these concepts an intention on the part of Congress in 1938 (twenty years earlier) to make Chapter XIII extension plans a remedy *in addition to* bankruptcy. Standing on this bland anachronism the Court finds significance in the fact that the six-year bar was enacted 35 years prior to the adoption of Chapter XIII. Indeed it was and we will demonstrate that it was definitely the intention of Congress to fully incorporate the six-year bar into Chapter XIII as a prohibition against confirming extension as well as composition plans.

It is true that the annual return to creditors under extension plans is currently well over $26,000,000.00. It is also true that in the majority of the wage earner cases the creditors would receive nothing if the debtor resorted to straight bankruptcy. But the Court stopped too soon with this reasoning process for it to be applicable to this case. The debtor in this case cannot resort to bankruptcy. The creditors are assured of payment in any event. Therefore, the drop in the Chapter XIII filings in the Sixth Circuit as a result of this case is of no legal significance since it does not follow that creditors are not being paid simply because repeater wage earner cases are not being filed. The Sixth

Circuit is on course with the Congressional purpose to prevent a class of habitual bankrupts. A collision course has just been charted by this Court.

The Court suggests that many debtors choose bankruptcy because they are unemployed and consequently have no earnings to use for extension arrangements, have an inextricably large indebtedness, or are simply unaware of the existence of an alternative to straight bankruptcy. There are some studies which tend to refute all these popular assumptions. See Occasional Paper No. 15, An Analysis of Economic and Personal Factors Leading to Consumer Bankruptcy by Robert Dolphin, Jr., Bureau of Business and Economic Research, Graduate School of Business Administration, Michigan State University, East Lansing, Michigan, 1965.

But we are here dealing with a specific case which also refutes these assumptions. In 1959 when Perry went into straight bankruptcy he was gainfully employed by Webb Texaco Service, 801 Elm Street, Ludlow, Kentucky. His total debts were $950.46, hardly inextricably large. He was represented by a prominent Northern Kentucky attorney. Since most of the Court's assumptions are unavailing, can relief now be justified on the ground the debtor or his attorney may not have known about a law that had been on the books 20 years?

POINT TWO

The intention of Congress is to be derived from what Congress has rejected as well as what it has approved.

Wage earner amortization was first reflected in Section 75 of the Hastings-Michener bill (72nd Cong., 1st Sess.). The Hastings-Michener bill provision was necessarily vague as to terms, but a succession of bills thereafter introduced,

all sponsored by the National Retail Credit Association and introduced in Congress through its efforts, represented such an improvement over the previous one so that Chapter XIII of the Chandler Act, while not perfect, has required few amendments.

Following introduction of the provision in the Hastings-Michener bill, came the Lewis bill of the 73rd Cong., H.R. 9227, and the successive Chandler bills of the 74th and 75th Congresses, namely, H.R. 6140, 74th Cong., 1st Sess., H.R. 11219, 74th Cong., 2nd Sess., and H.R. 1981, 75th Cong., 1st Sess. The latter bill was revised by Messrs. Valentine J. Nesbit, Special Referee in Bankruptcy, Birmingham, Ala. and by R. Preston Shealey, Washington Representative, National Retail Credit Association (both since deceased), and by them presented on behalf of the National Retail Credit Association at a hearing before the House Judiciary Committee on June 4, 1937, when that Committee was considering the general bankruptcy revision bill. Hearings on the subject of wage earner amortization were held before the House Judiciary Committee on March 11, 1936, February 19, 1937, June 4, 1937, and January 19, 1938, and at each of these hearings the National Retail Credit Association was represented and presented facts in regard to wage earners' plans. As a result, when the general bankruptcy revision bill was approved on June 22, 1938, Chapter XIII of that bill, devoted entirely to wage earner amortization, marked the fruition of years of effort on the part of retail credit granters to enact into legislation an appropriate bankruptcy provision.

The National Retail Credit Association proposed certain amendments which were not accepted in the final draft of the law. Section 14 of H.R. 1981, 75th Congress, First Session, which had the complete endorsement of the association provided as follows:

> "(14) The Court shall confirm the plan if satisfied that . . . (c) *in the event of a composition,* that the debtor has not been guilty of any of the acts, or failed to perform any of the duties, which would be a ground for denying his discharge. . . ."

The words "in the event of a composition" do not appear in the final draft of the law. See Hearings on Revision of the Bankruptcy Act before the Committee on the Judiciary of the House of Representatives, 75th Congress, First Session, on H.R. 8046, at pages 51-66 of the transcript, specifically at pages 58-59, for the first draft of the law. See Hearings before a Subcommittee of the Commitee on the Judiciary of the United States Senate, 75th Congress, Second Session, November 23, 1937 - February 15, 1938, at pages 63-64, for the final draft of the law. The use of the term "guilty" may have been a legislative oversight, but the deletion of the words "in the event of a composition" can hardly be characterized as an oversight. What inference is to be drawn from the deletion of these words?

Congress obviously intended the six-year bar to apply to extensions as well as compositions. The other possible inference is that Congress intended to exempt both extensions and compositions from the six-year rule, but the Court has already rejected this latter possible thesis, and rightly so, because Congress made it clear in the same general revision of the Act in 1938, by amendment of Section 14 of the Act that a composition was tantamount to a discharge in bankruptcy. Consequently, the six-year bar, as recognized by Justice Harlan in his dissenting opinion, precludes confirmation of either type of plan where the debtor has received a discharge in bankruptcy in a straight bankruptcy proceeding commenced within the previous six years. By judicial fiat this court has inserted in Chapter XIII a proviso which Congress specifically deleted.

POINT THREE

Section 656(a) of the Bankruptcy Act, 11 U.S.C., Sec. 1056(a), containing the "guilty . . . acts" phraseology which the Court found sufficiently ambiguous to impel recourse to legislative purposes also contains the requirement that the Court must be satisfied the plan "is for the best interests of the creditors." This requirement is relatively easy to satisfy where there has been no previous bankruptcy. Obviously it is for the best interests of the creditors for the debtor to pay them rather than go into straight bankruptcy. But where the "escape hatch" of bankruptcy is not available to the debtor, how can it be found to be for the best interests of the creditors to require them to await the slow process of payment under a wage earner extension plan.

The Court should keep in mind that the retail merchants who sponsored this legislation were interested in having their radios, television sets and refrigerators paid for first and in full despite the fact these appliances may have greatly depreciated in value. They were not overly concerned about the doctors, grocer and others who were to wait at the end of the line for payment. The hearings above cited reveal it was envisioned by the association that the monies paid in by the debtor during the first 18 months of operation of the plan would be utilized to pay for their appliances, after which payment to other creditors might begin. Surely Congress did not intend for this latter class of creditors to wait at the end of the line more than once every six years while the debtor pays for his car and television set, when the usual collection procedures are available to such creditors and the debtor cannot escape payment through bankruptcy. Such would surely not be in the best interests of this latter class of creditors. Conse-

quently, it becomes brightly evident that Congress intended to open the umbrella of the United States District Court over the debtor only once every six years and intended to preclude him from Chapter XIII relief if he had previously been in bankruptcy.

POINT FOUR

The Referee who decided this case is a Chapter XIII enthusiast. He has written several articles on Chapter XIII which have appeared in the Journal of the National Association of Referees in Bankruptcy and the Kentucky State Bar Journal. The 1964 edition of Kentucky Legal Forms, Vol. 2, published by Banks-Baldwin Company contains a chapter by him instructing attorneys on how to file Chapter XIII cases. He sponsored a forum on wage earner plans at a Kentucky State Bar Meeting held in Lexington, Kentucky, three years ago. The Chapter XIII trustee in his district has furnished each attorney in the district with sample petition and forms for filing wage earner cases. The trustee's office is computerized. The computer is programmed to maintain records of all receipts and disbursements and to write checks addressed to creditors where sufficient funds are available in a particular case. The computer publishes in quadruplicate a monthly statement of the status of each case. His office has under administration approximately 425 active Chapter XIII cases in which approximately $25,000.00 monthly is disbursed to creditors. When the referee assumed office in 1961 less than 1% of the bankruptcy filings in the Eastern District of Kentucky were Chapter XIII cases. Now nearly 25% of the cases filed are debtor relief proceedings under Chapter XIII. Few referees have excelled his record in promoting wage earner filings.

In the Eastern District of Kentucky a trustee is appointed in every straight bankruptcy case. The trustee is under instruction to ask the bankrupt whether his attorney discussed with him the availability of relief under Chapter XIII. The predictable response to that question will now be: "Yes, but my attorney advised me he could no longer recommend that I take Chapter XIII and save my right to bankruptcy since I can now come back and file under Chapter XIII if the going gets tough again." The referee who decided this case was intent on carrying out the congressional purpose of encouraging debtors to go Chapter XIII the first time at bat. The opinion of this Court may well destroy Chapter XIII except as a resort for repeaters. The Court may adopt the attitude that experience has shown otherwise; there are two answers to this position. First, subsequent experience is hardly evidence of what Congress intended in 1938. Secondly, the statistics maintained by the Administrative Office of the United States Courts do not reveal what percentage of wage earner petitions are repeater petitions and consequently there is no way of telling how much of the $26,000,000.00 disbursed by Chapter XIII trustees would have been paid in any event.

The language at page 7 of the Court's opinion characterizing as "illogical" the Referee's application of the six-year bar at the time of confirmation of an extension plan might well be interpreted as an exercise in name calling directed at numerous members of the Federal Judiciary who have disagreed with the Court on this point. Such language hardly contributes to the solution of this matter since everyone eternally vows that logic is on his side. Moreover, this is a sociological rather than a logical prob-

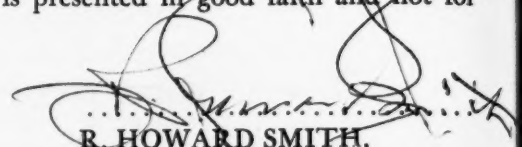
lem. Congress considered this problem in 1938 and rejected "Hospitality for Repeaters."

POINT FIVE

The Court's attention is directed to Paragraph 1 of the debtor's plan in which he proposes to pay secured creditors as secured only to the value of the property encumbered as determined by agreement or fixed by the Court pursuant to Section 57(h) of the Bankruptcy Act, 11 U.S.C., Sec. 93(h). Does this convert the plan into a composition? The Referee, the initial finder of facts, did not make a finding that the plan here involved was an extension rather than a composition. Indeed, he rightly assumed that this didn't have the slightest bearing on the ultimate legal question involved. It is not always possible to tell whether a plan involves an extension or a composition when the trustee is given the right to assume or reject executory contracts as in Paragraph 2 of this plan.

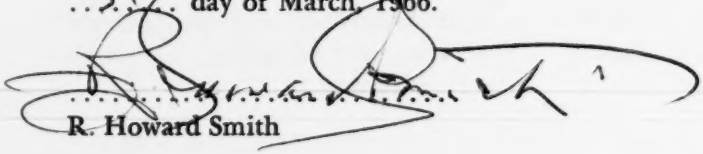
The Court's attention is directed to Paragraph 5 of the plan wherein it is provided that upon compliance by the debtor, with the provisions of this plan, the Court shall enter an order discharging the debts of creditors who will not accept payment under the plan. At page 11 of its opinion the Court suggests the problem of a second discharge is not likely to arise, whereas the problem is directly before the Court in this very case. The Court says such a discharge would be tantamount to transposing an extension plan into a composition. Yet the Court concludes its opinion by saying the petitioner's plan should have been confirmed despite the fact that under the Court's very reasoning the plan is a composition.

Comes Counsel for Commerce and states that this petition for rehearing is presented in good faith and not for delay.



R. HOWARD SMITH,
Attorney for Commerce Loan Company
Lawyers Building
Newport, Kentucky

I certify that a copy of this petition for rehearing was served by mail upon counsel for the debtor, Robert J. Harris, 1809 First National Bank Building, Cincinnati, Ohio, and Howell W. Vincent, 130 Park Place, Covington, Kentucky, this 31 day of March, 1966.



R. Howard Smith

SUPREME COURT OF THE UNITED STATES

No. 694.—October Term, 1965.

Warren W. Perry, Petitioner, *v.* Commerce Loan Company.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March 7, 1966.]

Mr. Justice Clark delivered the opinion of the Court.

Perry, a furnace operator employed by Moore Lead Company, filed a petition in the District Court under Chapter XIII of the Bankruptcy Act, 52 Stat. 930 (1938), as amended, 11 U. S. C. §§ 1001–1086,[1] requesting confirmation of his plan for an extension of time within which to pay his debts out of his future wages. In his plan he proposed to pay his debts of $1,412 in 28 equal monthly installments of $60 from his wages of $265 a month. On the hearing for confirmation of the plan, however, it appeared that Perry had previously filed a petition in straight bankruptcy and obtained a discharge therein in 1959, within six years of the filing of this proceeding. On motion of the respondent Commerce Loan Company, the referee dismissed the plan on the ground that the previous bankruptcy was a bar thereto under the provisions of § 14 (c)(5) of the Act.[2] On review the District Court upheld the dismissal. The Court of Appeals affirmed. 340 F. 2d 588. We granted certiorari,

[1] All United States Code citations herein refer to the 1964 edition.

[2] 52 Stat. 850 (1938), as amended, 11 U. S. C. § 32 (c)(5): "(c) The court shall grant the discharge [in bankruptcy] unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title . . . ." 11 U. S. C. § 32 (c)(5).

382 U. S. 889, in view of a conflict on the point among the courts of appeals.[3] We conclude that confirmations of wage-earner plans by way of extensions are not affected by § 14 (c)(5), and, therefore, reverse the judgment below.

I.

Background of Chapter XIII.

Although statutory relief for the financially distressed wage earner had been available to some extent as early as the Bankruptcy Act of 1867, 14 Stat. 517, Congress found in its study prior to the 1938 revision of the bankruptcy laws that there were no effective provisions for the complete repayment of the wage earner's debts suited to his problems. H. R. Rep. No. 1409, 75th Cong., 1st Sess., 53 (1937). For example, compositions under § 12 of the 1898 Act, 30 Stat. 549, were available to the wage earner, but the relief afforded was unsatisfactory. Section 12 proceedings, which were primarily adaptable for use by business entities, were disproportionately expensive in view of the small sums ordinarily involved in wage earner cases; they lacked flexibility; and they did not provide for jurisdiction of the court subsequent to confirmation. Other provisions of the Act had similar disadvantages. Faced with inadequate relief under the federal bankruptcy laws and often with little protection from creditors under state law, the only course usually open to the wage-earning debtor was straight bankruptcy. In such proceedings, everyone lost—the creditors by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt. In designing a remedy for the di-

[3] Compare *In re Schlageter*, 319 F. 2d 821 (C. A. 3d Cir. 1963), and *Perry* v. *Commerce Loan Co.*, *supra*, with *Edins* v. *Helzberg's Diamond Shops, Inc.*, 315 F. 2d 223 (C. A. 10th Cir. 1963), and *In re Mahaley*, 187 F. Supp. 229 (D. C. S. D. Cal. 1960). See also *In re Mayorga*, — F. 2d — (C. A. 9th Cir. 1966).

lemma facing a debtor seeking to repay, rather than avoid, his obligations, the Congress settled upon the wage-earner extension-of-time procedures of Chapter XIII. The chapter gave—and was intended to give—to the wage earner a reasonable opportunity to arrange installment payments to be made out of his future earnings. Congress clearly intended to encourage wage earners to pay their debts in full, rather than to go into straight bankruptcy or composition, by offering two inducements: (1) avoidance of an adjudication of bankruptcy with its attendant stigma; and, at the same time, (2) temporary freedom during the extension from garnishments, attachments and other harassment by creditors. H. R. Rep. No. 1409, 75th Cong., 1st Sess., at 52–55.

History demonstrates that extension plans under Chapter XIII are fulfilling the purposes intended. The records of the Administrative Office of the United States Courts show that over the past 20 years more than 20% of all proceedings filed under the Bankruptcy Act by wage earners have been for plans under Chapter XIII, the overwhelming majority of these being for extension plans.[4] Since many wage earners who go into bankruptcy do not proceed under Chapter XIII because they are unemployed (and consequently have no earnings to use for extension arrangements), have an inextricably large indebtedness, or are simply unaware of the existence of an alternative to straight bankruptcy, the 20% figure is even more significant. Moreover, large sums of

[4] Chapter XIII also provides for wage-earner plans by way of composition. Compositions under that chapter, however, are almost insignificant in the operation of wage-earner plans because most creditors will not give the necessary approval. The latest published statistics show that 95% of the funds paid to creditors under Chapter XIII proceedings derive from extensions rather than compositions. Administrative Office of the United States Court, Tables of Bankruptcy Statistics, Table F 11 (1964) (by computation).

money are annually returned to creditors under extension plans, the current rate being well over $26,000,000. As wage earners ordinarily have little or no assets available for distribution in straight bankruptcy, these sums represent settlements which the debtors would otherwise be unable to effect and the creditors unable to obtain. See Note, The Wage Earner Plan—A Superior Alternative to Straight Bankruptcy, 9 Utah L. Rev. 730 (1965); Allgood, Operation of the Wage Earners' Plan in the Northern District of Alabama, 14 Rutgers L. Rev. 578 (1960).

In light of the proven advantages of extension plans, the Congress has re-expressed its legislative purpose in amendments to Chapter XIII adopted since the original enactment. A report to the House of Representatives expresses it in these words:

> "[C]hapter XIII provides a highly desirable method for dealing with the financial difficulties of individuals. It creates an equitable and feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy. The power of the court to change the amount and maturity of installment payments without affecting the aggregate amount of such payments makes Chapter XIII particularly applicable to the present-day financial problems generated by heavy installment buying." H. R. Rep. No. 193, 86th Cong., 1st Sess., 2 (1959).

And similarly, the Senate report states:

> "We think there can be no doubt . . . that a procedure by which a debtor who is financially involved and unable to meet his debts as they mature, over a period of time, works out of his involvement and pays his debts in full is good for his creditors and

good for him." S. Rep. No. 179, 86th Cong., 1st Sess., 2 (1959).

It is with this underlying policy in mind that we turn to a consideration of the problem posed here; *i. e.*, whether confirmation of an extension plan is barred by a discharge in bankruptcy obtained within the previous six years.

II.

Chapter XIII requires the confirmation of a wage-earner extension plan if "the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." § 656 (a)(3). And Chapter III commands that a discharge of a bankrupt shall be granted unless the court is satisfied that the bankrupt has "within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . . ." § 14 (c)(5). The "discharge" of a debtor under a wage-earners plan shall issue after compliance with the provisions of the confirmed plan, § 660, c. XIII, 11 U. S. C. § 1060. If at the expiration of three years from the date of confirmation of the plan the debtor has not completed his payments in accordance with his plan the court may, after notice and hearing, discharge the debts and liabilities dischargeable under the plan, *provided* the court is satisfied that the debtor's failure to make all of his payments "was due to circumstances for which he could not be justly held accountable." § 661, c. XIII, 11 U. S. C. § 1061. And finally, § 602, of Chapter XIII [5] declares that the provisions of

[5] 11 U. S. C. § 1002: "The provisions of chapters 1–7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . . ."

Chapters I through VII of the Bankruptcy Act, insofar as they are not inconsistent or in conflict with the provisions of Chapter XIII, apply in proceedings thereunder.

We should note at the outset that in his present application for relief Perry did not file a straight, voluntary bankruptcy action in the District Court, nor "a composition or an arrangement by way of composition or a wage earners plan by way of composition." He proposed to pay all his debts, secured and unsecured, and sought only an extension of time—28 months—in which to pay them in equal installments from his future wages. Ordinarily, a wage earner seeking to obtain the benefits of extension proceedings under Chapter XIII need only file a plan that meets the approval of the majority of his creditors, § 652, 11 U. S. C. § 1052, and is confirmed by the court; whereupon the plan becomes binding, § 657, 11 U. S. C. § 1057, and the appointed trustee commences collecting and disbursing to the creditors the periodic payments provided under the plan. Extension plans, therefore, differ materially from straight bankruptcy, arrangements under Chapters XI and XII, and wage-earner plans by way of composition, all of which contemplate only a partial payment of the wage earner's debts. Indeed, under an extension plan, the wage earner who makes the required payments will have paid his debts in full and will not need a discharge, even though the Act provides for a formal one. § 660.

In view of these considerations and the purposes of Chapter XIII as outlined above, we do not believe that the Congress intended to apply the six-year bar of § 14 (c)(5) to the confirmation of wage-earner extension plans. The six-year bar was enacted 35 years prior to the adoption of Chapter XIII, 32 Stat. 797 (1903), at a time when no relief corresponding to extension plans existed under the Bankruptcy Act. The unmistakable

purpose of the six-year provision was to prevent the creation of a class of habitual bankrupts—debtors who might repeatedly escape their obligations as frequently as they chose by going through repeated bankruptcy. See H. R. Rep. No. 1698, 57th Cong., 1st Sess., 2 (1902); *In re Thompson*, 51 F. Supp. 12, 13 (1943). But an extension plan has no escape hatch for debtors, it is "a method by which, without resorting to bankruptcy proceedings in the usual sense, a wage earner may meet the claims of creditors." S. Rep. No. 179, 86th Cong., 1st Sess., 2 (1959). To apply the six-year bar at the time of confirmation of an extension plan would be both illogical and in head-on collision with the congressional purpose as announced in the adoption and design of extension plans under Chapter XIII.[6] Even if a literal reading of these provisions suggested the application of § 14 (c)(5) to extensions plans, we would have little hesitation in construing the Act to give effect to the clear policy underlying Chapter XIII. As was said in *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or

[6] Such a collision undoubtedly affects the functioning of the Act. The Administrative Office of the United States Courts reports that a "pronounced drop in Chapter XIII filings" has been noted in the districts in the Sixth Circuit as a result of the holding in *Perry*. Administrative Office of the United States Courts, Memorandum for the Committee on Bankruptcy Administration of the Judicial Conference of the United States, Report on the Use of Chapter XIII, p. 2 (June 22, 1965).

> futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

But such a literal reading is not apparent in this case. Section 656 (a)(3) does not, on its face, state that a court may confirm an extension plan only if the debtor is eligible for a discharge in bankruptcy. Rather, the language of the section speaks, ambiguously, of "guilty" acts and unfulfilled duties. There is, of course, no unfulfilled duty involved in § 14 (c)(5). Moreover, a prior bankruptcy is hardly a "guilty" act within the usual meaning of that word, and its use as a reference to § 14 (c)(5) is strained indeed. In fact, the legislative history of § 14 (c) lends some support to a view that a prior discharge is not a "guilty" act. In 1903, when the forerunners of subdivisions (3) through (6) were originally added to § 14 (c) the House report stated:

> "This amendment also provides four additional grounds for refusing a discharge in bankruptcy: (1) Obtaining property on credit on materially false statements; (2) making a fraudulent transfer of property; (3) having been granted or denied a discharge in bankruptcy within six years, and (4) having refused to obey the lawful orders of the court or having refused to answer material questions approved by the court. *No person who has been guilty of any of these fraudulent acts should be discharged, and a person who has refused to obey the order of the court ought not to be discharged, and it is quite clear that no person should have the benefit of the act as a voluntary bankrupt oftener than*

once in six years." H. R. Rep. No. 1698, 57th Cong., 1st Sess., 2 (1902). (Italics added.)

This language might be construed to set apart acts which are criminal or reprehensible in nature and to consider a prior bankruptcy to be something other than a "guilty" act. But we need not, and do not, go so far as to place this interpretation on the words "guilty acts." It suffices that we find in them sufficient ambiguity to impell recourse to the legislative purposes, outlined above, underlying § 14 (c)(5). And while the identical language of § 656 (a)(3) has been a part of the Bankruptcy Act since 1898, as a restriction to confirmation of compositions under what is now § 366 (3), 52 Stat. 911, as amended, 11 U. S. C. § 766 (3) and § 472 (3), 52 Stat. 923, as amended, 11 U. S. C. § 872 (3), there is no indication that its enactment in Chapter XIII was intended to bar confirmation of wage-earner extensions. Indeed, it would seem that the absence of any legislative history bearing on the adoption of this provision in Chapter XIII indicates that its inclusion was a legislative oversight,[7] at least insofar as it bears on wage-earners' extension plans.

This oversight is, of course, cured by the provisions of § 602, which further buttress our conclusion. That section directs that the provisions of Chapters I through VII, which include § 14 (c)(5), are incorporated into Chapter XIII only "insofar as they are not inconsistent or in conflict with the provisions of this chapter." The rationale of § 14 (c)(5)—the prevention of recurrent

[7] This is not the only example of drafting oversights in the Act. Although § 14 (c)(5) was amended in 1938 to include a reference to wage-earner compositions, the provision in that section relating to confirmation of a composition was not deleted even though § 12 of the 1898 Act, 30 Stat. 549, under which such a composition might have been confirmed, was repealed in the same enactment.

avoidance of debts—is so inconsistent with the aims of extension plans as to fall squarely within the exception of § 602.

It is claimed, however, that § 686 (5) of Chapter XIII, 11 U. S. C. § 1086 (5), indicates a contrary result. We think not. This provision, in setting the effective date of the chapter, provides that confirmations thereunder "shall not be refused because of a discharge granted or a composition confirmed prior to the effective date of this amendatory Act." It must be remembered that extension plan relief of Chapter XIII was novel to the law of bankruptcy. However, both compositions and straight bankruptcies were old on the books. The Congress, we believe, was only making certain, insofar as extensions are concerned, that the old procedures would not affect the new. This would be consistent with the purpose of the Congress not to make § 14 (c)(5) applicable to confirmations in extension plan cases. Rather than an illogical exemption from the six-year bar, given in cases where a discharge had been received before—but not after—the new Act, § 686 (5) merely gave expansive effect to the congressional purpose by making it clear that the remedy afforded be available retroactively as well as prospectively.

We emphasize that our construction of the Act does not preclude application of § 14 (c)(5) to confirmations of general arrangements under Chapter XI or to real property arrangements under Chapter XII. It is true that restrictions identical in phrasing to § 656 (a)(3) appear both in Chapter XI, § 366 (3), and in Chapter XII, § 472 (3). The relief afforded in those chapters, however, represents a wholly different statutory scheme from wage-earners' extensions, and the restrictive provisions are not, therefore, in *pari materia*. Sections 366 (3) and 472 (3) neither impart to nor receive from § 656 (a)(3) a meaningful effect. Nor does our construction

imply an immunity from the six-year bar to those seeking confirmation of wage-earner compositions. A composition under Chapter XIII, unlike extensions, is closely akin to straight bankruptcy and to proceedings under Chapters XI and XII, for under such a plan the debtor is discharged from his debts and claims of the creditors are only partially paid. *In re Jenson,* 200 F. 2d 58 (1952), cert. denied, 345 U. S. 926 (1953), but see *In re Goldberg,* 53 F. 2d 454 (1931). It is both logical and consistent with the underlying purposes of § 14 (c)(5) that confirmation of wage-earner compositions be barred by prior bankruptcy, since repeated use of such plans would, in effect, provide an opportunity for abuse of the Act.

It has been argued that extension plans do not completely avoid the possibility of adjusting the wage earner's debts. It is true that § 660 provides for discharge after compliance with the provisions of a Chapter XIII plan. While this section applies to wage-earner compositions as well as to extensions, a "discharge" thereunder has a wholly different impact where an extension is involved. In the latter case a discharge is little more than a mere formality. It is also claimed that § 661 presents a somewhat more troublesome objection. That section as we have noted may allow a wage earner to obtain a release from all dischargeable debts if, after notice and hearing, the court is satisfied that the failure of the debtor to comply with the plan was due to circumstances for which he could not be held justly accountable. However, we see no serious problems in this section. First, experience has shown that almost all plans approved under the Act envision repayment within three years. The problem, therefore, is not likely to arise. Second, there are adequate provisions for notice and hearing prior to a discharge under § 661. Objecting creditors may raise § 14 (c)(5) as a bar to relief if and when the debtor seeks such relief. A request for relief

under § 661 would, in effect, constitute an attempt to transpose an extension plan into a composition, and a grant of relief thereunder would, at that time, be tantamount to a confirmation of a composition. The six-year bar would, therefore, be operative in such a situation. In view of this, as well as the power of the court to make certain that the provisions of the chapter are not abused, we see no reason to allow this section alone to destroy the beneficial purposes of enactment.[8]

For the foregoing reasons, we conclude that petitioner's plan should have been confirmed.

Reversed and remanded.

[8] We note that the National Bankruptcy Conference has proposed amendments to the Act which are intended to clarify the interrelationship of §§ 14 (c)(5), 656 (a)(3), and 661. The proposed clarification is in accord with our construction of the Act. See H. R. 20, 89th Cong., 1st Sess. (1965). The Judicial Conference, upon request of the Congress, has submitted its views approving the bill. Letter from the Director of the Administrative Office of the United States Courts to the Chairman of the Committee on the Judiciary, House of Representatives (September 29, 1965). See also Report of the Proceedings of the Judicial Conference of the United States, at 68 (September 22–23, 1965).

SUPREME COURT OF THE UNITED STATES

No. 694.—October Term, 1965.

Warren W. Perry, Petitioner, v. Commerce Loan Company.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March 7, 1966.]

Mr. Justice Harlan, dissenting.

The result reached by the Court may well be desirable, but in my opinion it is one that cannot be attained under the present statute within the proper limits of the judicial function.

Chapter XIII of the Bankruptcy Act establishes procedures for the relief of wage earners who are unable to meet their debts as they mature. Two types of procedures are made available: extension plans under which the wage earner's debts are intended to be paid off in full over a period of time, and composition plans under which only a percentage of debts are recoverable. Referring to both types of plans, § 656 of the Bankruptcy Act, 11 U. S. C. § 1056 (1964 ed.), provides that "a plan" shall not be confirmed if the debtor has "been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." To ascertain what would be a bar to the discharge of a bankrupt one must turn to § 14 (c), 11 U. S. C. § 32 (c) (1964 ed.), which provides, among other things, that no discharge may be granted if the bankrupt has been granted a previous discharge within six years. § 14 (c)(5). It is undisputed that petitioner here was so discharged, and there is no question but that he would have been refused another discharge in bankruptcy at the time he applied for this extension plan. The statu-

tory scheme thus plainly seems to bar him from obtaining Chapter XIII relief as well.

The process by which the Court has undertaken to release the debtor from the impact of these straightforward statutory provisions seems to me wholly unavailing. The Court's major argument is built upon its reading of the word "guilty" in § 656 (a)(3). As already noted that section denies confirmation to an extension plan if the debtor has been "guilty" of any act that would bar a discharge in bankruptcy. The argument is that since receiving a prior discharge is neither unlawful nor morally reprehensible one cannot be "guilty" of it, and hence that the six-year "discharge" provision cannot be a bar to a Chapter XIII extension plan.

This argument presupposes that the word "guilty" was intentionally used in § 656 in a discriminating sense, that is, to distinguish among those acts catalogued in § 14 (c) which under § 656 would bar confirmation of an extension plan. The fact of the matter is, however, that when Congress in 1938 enacted Chapter XIII, 52 Stat. 930–938, it took as its model the form and language of the prior bankruptcy act, more specifically § 12d, 30 Stat. 550, dealing with compositions.[1] The "guilty" phrase was appropriate in that 1898 statute because at that time the only bars to a discharge in the predecessor of § 14 (c) were offenses punishable by imprisonment or fraudulent concealment. Section 14b, 30 Stat. 550. In 1903, Congress amended § 14b to include the six-year bar, 32 Stat. 797, and over the years other grounds for refusing confirmation have been added to that section. But the word "guilty" was never changed, and has obviously remained in several chapters of the

[1] "The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; . . . ." § 12d, 30 Stat. 550.

act merely as a shorthand way of referring back to those items that preclude the granting of a discharge. Thus, Chapter XI of the Bankruptcy Act, which deals with arrangements, has almost an exact duplicate of § 656 (a)(3) containing the same "guilty" phraseology. § 366 (3), 11 U. S. C. § 766 (3) (1964 ed.). Chapter XII, which deals with real property arrangements, contains a similar provision. § 472 (3), 11 U. S. C. § 872 (3) (1964 ed.). And of course Chapter XIII, dealing with *both* compositions and extensions for wage earners, uses this language. These parallel provisions all derive from the same section framed in 1898.

This history and this parallelism indubitably demonstrate two things: first, that the Congress did not devise the "guilty" terminology in 1938 as a means of making a subtle distinction between the morally reprehensible bars to bankruptcy contained in § 14 (c) and the other bars there enumerated; and second, that the word "guilty" means the same thing when applied to general arrangements in § 366, to real property arrangements in § 472, and to compositions and extensions in § 656. If the word "guilty" excludes the six-year bar for extension plans, it is impossible to see what sort of statutory interpretative sleight of hand would save it for general arrangements, real property arrangements, and wage-earner composition plans. Moreover, it seems already accepted that as applied to Chapter XI arrangements, the "guilty" provision does refer back to the six-year bar. See *In re Jensen*, 200 F. 2d 58; 9 Collier, Bankruptcy ¶ 9.19, at 310–311 (14th ed. 1964); Kennedy, Hospitality for Repeaters Under the Bankruptcy Act, 68 Commercial Law J. 117, 119–120 (1963). The same would appear to be true of the meaning of "guilty" in Chapter XII. See 9 Collier, *supra*, ¶ 9.07, at 1146. And the Court in its present opinion appears to concede that when applied to

compositions, § 656 is somehow transformed to include the six-year bar.

In short, construing "guilty" to refer only to "reprehensible" aspects of § 14 (c) has no basis in legislative history, and requires a strained attempt to distinguish other applications of the identical section and of parallel sections which concededly are applied more generally. Because of its ramifications, this construction may do serious harm to the administration of Chapter XIII compositions, Chapter XII real property arrangements, and Chapter XI arrangements.

The Court also advances another argument in support of its conclusion that confirmation of this extension plan was not barred by virtue of §§ 656 and 14 (c). This argument rests essentially on § 602 of the Bankruptcy Act, 11 U. S. C. § 1002 (1964 ed.). Section 602 provides that the provisions of Chapters I through VII shall apply to Chapter XIII "insofar as they are not inconsistent or in conflict with the provisions of this chapter . . . ." It seems to be said that the six-year bar is inconsistent with the provisions of Chapter XIII because the extension plan is designed to give wage earners relief, and the six-year bar would preclude some such people from receiving that relief without good reason.

This argument likewise does not withstand analysis. To be sure the six-year bar makes it impossible for certain wage earners to get relief by way of extension plans, but so do all the other restrictions on this form of relief. Nobody would suggest that it is "inconsistent" with Chapter XIII to withhold extension-plan relief from those who engage in fraud on the ground that such a restriction cuts down the number of people who can take advantage of Chapter XIII. Section 656 clearly does establish restrictions on the class of people to whom relief is available; the question before us is whether the six-year bar is such a limitation; citation of § 602 is con-

clusory only, and makes no positive contribution to a meaningful analysis.

My conclusion that the statute should be read literally to preclude the confirmation of an extension plan if the applicant has been granted a discharge within the previous six years is reinforced by § 686 (5) of Chapter XIII, 11 U. S. C. § 1086 (5) (1964 ed.). Section 686 (5) in its entirety declares that "confirmation of a plan under this chapter shall not be refused because of a discharge granted or a composition confirmed prior to the effective date of this amendatory Act." The inclusion of this provision indicates quite clearly that Congress did believe that a prior discharge would be a bar to a Chapter XIII plan, and that it decided to remove that restriction only for discharges granted *before* September 22, 1938, the effective date of the statute in question. See 10 Collier, *supra*, ¶ 33.05, at 477. Such a provision is perfectly understandable. Before the enactment of the extension plan amendment, wage earners who sought a bankruptcy remedy could obtain only a discharge through straight bankruptcy or composition. There would be no reason to preclude wage earners who availed themselves of such relief prior to September 1938 from obtaining a more favorable extension plan subsequently. On the other hand, after enactment of Chapter XIII, wage earners would have the opportunity to apply for an extension plan. It is not difficult to understand why Congress should have refused to permit wage earners who chose a discharge in bankruptcy rather than an extension plan a second opportunity, within six years, to receive statutory relief. I am frank to say that I am unable to perceive the basis for the Court's contrary explanation of this provision.

The short of the matter is that the Court's arguments do not support the conclusion it reaches. The conclusion is of course supportable as a legislative judgment, even though arguments can be made for both sides. Thus,

it might be argued for the six-year bar in a Chapter XIII context somewhat as follows: the wage-earner extension plan is a new and very advantageous procedure for the debtor, but it is a burden on the courts. It is also a constraint on creditors who will be delayed in collecting, will be precluded from garnishing, and may not receive full repayment if the debtor obtains a discharge under § 661 of the Act, 11 U. S. C. § 1061 (1964 ed.). It is therefore reasonable to limit the availability of this kind of relief to those wage earners who have not had the advantage of a discharge in bankruptcy in the previous six years. Furthermore, it is certainly arguable that the six-year bar encourages wage earners to make use of the Chapter XIII procedure. With the prior-discharge bar eliminated, a debtor might eschew an extension plan and decide instead to go through straight bankruptcy first, waiting a few months until the going once again "gets tough" to take advantage of the extension plan.

I venture considerations such as these not as overcoming the countervailing ones relied on by the Court, and heretofore espoused by others,[2] but simply to point up the fact that this is not one of those cases where seemingly straightforward statutory language must yield its literal meaning to a contrary congressional intent. What we have here are but two contrasting legislative policies, wherein the Court's duty is to take the statute as it is presently plainly written.

I would affirm the judgment of the Court of Appeals.

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[2] See the proposed amendment of the Bankruptcy Act by the National Bankruptcy Conference, note 9, *ante*, p. 12; Kennedy, Hospitality for Repeaters Under the Bankruptcy Act, 68 Commercial Law J. 117 (1963).